Breaking It Down to Twigs and Seeds:
Medical Marijuana on the Job

By Tobias W. Crawford

Introduction

You manage a warehouse and an employee tells you that Joe, one of your best forklift drivers, smells like marijuana. You call Joe in and his eyes are bloodshot, he seems dazed, and he is talking funny. You ask him if he has taken anything, and he pulls out his state issued medical marijuana card. What can you do?

In most states that have legalized medical marijuana, you may not be obligated to accommodate Joe’s medical marijuana use. In fact, several state courts have declined to extend employment discrimination protections to medical marijuana users. Recently, some states have provided statutory protections to medical users. Even in those states, the medical marijuana laws stop short of requiring an employer to accommodate on-the-premises medical use or impairment. This article presents an overview of how employment discrimination claims by medical marijuana users have fared in the courts and describes efforts in some states to provide medical users with statutory protections.

Disjointed Treatment by State and Federal Government

The federal government criminalized marijuana possession in 1970 with the passage of the Controlled Substances Act ("CSA").\(^1\) Prior to the CSA, marijuana was not illegal under federal law, though highly regulated by federal tax and customs law.\(^2\) Since the passage of the CSA, marijuana has been classified a Schedule I drug, making its manufacture, distribution, or possession a criminal offense except for research approved by the Food and Drug Administration.\(^3\) The CSA defines a Schedule I drug as posing “a high potential for abuse,” having “no currently accepted medical use in treatment in the United States,” and lacking an “accepted safe use . . . under medical supervision.”\(^4\) To varying degrees, these three

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\(^1\) Gonzales v. Raich, 545 U.S. 1, 14 (2005). To view Supreme Court briefs related to the Gonzales case, go to 2003 U.S. Briefs 1454 on Lexis.com. To view oral argument transcripts, go to 2004 U.S. Trans. LEXIS 70.

\(^2\) 545 U.S. 1, at 11.

\(^3\) 545 U.S. 1, at 14.

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A NOTE ON CITATION:
The correct citation form for this publication is:
14 Bender’s Lab. & Empl. Bull. 121 (April 2014)

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factors govern the classification of drugs under the CSA’s four remaining schedules.\footnote{\textit{Raich}, 545 U.S. at 14.} Drugs classified into these less restrictive schedules may be used for personal medical use with a prescription.\footnote{21 U.S.C. § 829(a)-(c).}

Notwithstanding efforts to lower its classification, including petitions to the Drug Enforcement Agency, marijuana remains illegal under federal law.\footnote{Americans for Safe Access v. Drug Enforcement Admin., 706 F.3d 438, 441 (D.C. Cir. 2013).} Beginning with California in 1996, however, states have begun to legalize marijuana use for medical purposes.\footnote{\textit{Raich}, 545 U.S. at 5.} Twenty states and the District of Columbia have enacted laws that permit medical marijuana use.\footnote{Marijuana Policy Project, “State-By-State Medical Marijuana Laws,” http://www.mpp.org/assets/pdfs/library/State-by-State-Laws-Report-2013.pdf, 25-26 (Fall 2013).} Many of these laws were enacted through voter referenda and not the legislative process.\footnote{Jay M. Ziter, “Construction and Application of Medical Marijuana Laws and Medical Necessity Defense to Marijuana Laws,” 50 A.L.R. 6th 353 (Originally published in 2009).} These laws generally require a doctor’s note setting forth why marijuana is medically recommended.\footnote{Jay M. Ziter, “Construction and Application of Medical Marijuana Laws and Medical Necessity Defense to Marijuana Laws,” 50 A.L.R. 6th 353 (Originally published in 2009).} Two states recently enacted laws that permit the recreational use of marijuana as well.\footnote{Colo. Const. art. XVIII, § 16 (“[d]eclar[ing] that the use of marijuana should be legal for persons twenty-one years of age or older [in Colorado] and taxed in a manner similar to alcohol”); R.C.W.A. 69.50.4013(3) (providing that “[t]he possession, by a person twenty-one years of age or older, of useable marijuana or marijuana-infused products in amounts that do not exceed those set forth in RCW 69.50.360(3) is not a violation . . . of Washington state law”).}

Even where medical marijuana is legal under state law, a user may still face prosecution under federal law. In \textit{Gonzales v. Raich}, the Supreme Court held that the Commerce Clause permitted Congress to prohibit the cultivation and use of marijuana even though such cultivation and use complied with California’s medical marijuana law.\footnote{\textit{Raich}, 545 U.S. at 32-33.} \textit{Raich} reached this conclusion notwithstanding the marijuana’s local cultivation and use, reasoning that it nevertheless affected a much larger commercial market.\footnote{\textit{Raich}, 545 U.S. at 32-33.} Prior to \textit{Raich}, in \textit{United States v. Oakland Cannabis Buyers’ Cooperative}, the Supreme Court held that the medical necessity is not a defense to manufacturing and distributing marijuana in violation of the CSA.\footnote{\textit{United States v. Oakland Cannabis Buyers’ Cooperative}, 532 U.S. 483, 494 (2001).}

The Department of Justice (“DOJ”) has made clear that prosecuting medical marijuana use is not a priority. In a 2009 memorandum, the DOJ directed its prosecutors to focus limited federal resources towards “[t]he prosecution of significant traffickers of illegal drugs, including marijuana,” but not towards medical users “whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana.”\footnote{David W. Ogden, “Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana,” http://www.justice.gov/opa/documents/medical-marijuana.pdf, 1-2 (Oct. 19, 2009).} Although a 2011 memorandum from the DOJ suggested that commercial cultivators may still face prosecution, the DOJ issued a memorandum in 2013 that clarified that commercial cultivators acting in compliance with a state regulatory regime should not face prosecution unless their conduct threatens federal priorities, such as preventing intrastate sales of marijuana and the distribution of marijuana to minors.\footnote{James M. Cole, “Guidance Regarding Marijuana Enforcement,” http://www.justice.gov/opa/docs/ dag-guidance-2011-for-medical-marijuana-use.pdf, 1-2 (June 29, 2011).}
Medical marijuana users’ attempts to seek protection against employment discrimination from the courts have proved unsuccessful. Several courts have reasoned that neither the text nor history of a particular medical marijuana law supports extending employment protections. In *Ross v. RagingWire Telecommunications, Inc.*, the California Supreme Court determined that the voters that passed California’s medical marijuana referendum only intended to exempt medical users from criminal liability.18 Pointing to both the text and history of the law, *Ross* concluded that the voters did not “attempt[] the impossible” and require employers to accommodate an activity that remains illegal under state law.19

Without reference to marijuana’s illegality under federal law, the Washington Supreme Court declined to extend employment protections in *Roe v. TeleTech Customer Care Management (Colorado) LLC*.20 As with *Ross*, neither the unambiguous language of Washington’s law nor the history of its passage required employers to accommodate medical users.21 The Sixth Circuit in *Casias v. Wal-Mart Stores, Inc.* and the Montana Supreme Court in *Johnson v. Columbia Falls Aluminum Company* have also reached similar conclusions.22

An appeals court in Colorado recently addressed whether Colorado’s lawful activities statute protected a medical user in *Coats v. Dish Network*.23 The statute prohibits an employer from discharging an employee for “engaging in any lawful activity off the premises of the employer during nonworking hours.”24 Acknowledging his marijuana use’s illegality under the CSA, the medical user argued that “lawful activity” refers only to state law and not to federal law.25 The court disagreed, concluding that the ordinary meaning of “lawful” encompassed both state and federal law and that the statute’s legislative history did not suggest an “intent to extend employment protection to those engaged in activities that violate federal law.”26

Exclusions for illegal drug use in the Americans with Disabilities Act (“ADA”), as well as under state antidiscrimination law, pose an additional hurdle for medical users asserting discrimination claims. The ADA excludes “an individual who is currently engaging in the illegal use of drugs” from its definition of an “individual with a disability.”27 The Ninth Circuit relied on this exclusion in *James v. City of Costa Mesa*, which upheld the dismissal of a group of medical users’ claims that two municipalities had violated the ADA’s prohibition against discrimination in public services by closing marijuana dispensing facilities within their borders.28 The medical users in *James* did not dispute that the illegal drug exclusion, if applicable, rendered their claims meritless.29 The users instead argued that the exceptions for supervised and authorized uses rendered the exclusion inapplicable.30 Based on the text and history of the ADA, the Ninth Circuit rejected these arguments, holding that “doctor-recommended marijuana use permitted by state law, but prohibited by federal law, is an illegal use of drugs for purposes of the ADA.”31

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19 42 Cal. 4th at 926-27 (stating that “[n]o state law could completely legalize marijuana for medical purposes because the drug remains illegal under federal law, even for medical users”) (internal citations omitted).
21 171 Wash. 2d at 747-751.
25 *Coats*, 303 P.3d at 150.
28 James v. City of Costa Mesa, 700 F.3d 394, 396 (9th Cir. 2012).
29 James, 700 F.3d at 398.
30 James, 700 F.3d at 398.
31 James, 700 F.3d at 405.
In Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries, the Oregon Supreme Court examined whether a medical user fell within the illegal use exclusion in Oregon’s anti-discrimination statute. The Oregon statute exempts “uses authorized under … other provisions of state … law” from its illegal use exclusion. As Oregon’s medical marijuana law affirmatively authorized medical use, Emerald reasoned that the exception to the exclusion applied. However, Emerald went on to conclude that the CSA preempted Oregon’s medical marijuana law. Through the CSA, “Congress imposed a blanket federal prohibition on the use of marijuana without regard to state permission to use marijuana for medical purposes.” As a consequence, Oregon’s law “stood as an obstacle to the enforcement of federal law … [by] affirmatively authoriz[ing] the very conduct that federal law prohibited.” Absent an enforceable state law authorizing medical use, Emerald held the authorized use exception inapplicable.

In addition to the authorized use exception, the medical user in Emerald contended Oregon’s exception for the “use of a drug taken under supervision of a licensed health care professional, or other uses authorized under the [CSA],” rendered the illegal use exclusion inapplicable. The Emerald court interpreted this exception to require that the CSA authorize the health care professional “to prescribe or administer the controlled substance” and also to “monitor or supervise” its use by his or her patient. As the CSA prohibits health care professionals from prescribing Schedule I substances, including marijuana, Emerald concluded that the supervised use exception also did not apply.

The courts have uniformly rejected claims that an employer discharged a medical user in violation of public policy. Casias, Roe, and Ross all declined to find a sufficiently fundamental policy to protect medical users to apply the public policy exception.

Employment Protections in Recent Medical Marijuana Laws Blaze New Territory

Medical marijuana laws have increasingly begun to provide medical users with employment protections. Since 2006, when Rhode Island enacted the first medical marijuana law with employment discrimination protections, ten states have enacted medical marijuana laws. Of these ten states, six – Arizona, Connecticut, Delaware, Illinois, Maine, and Rhode Island – have explicitly protected medical marijuana users from employment discrimination. This shift may track popular opinion. From fifty-eight percent in 1997 to seventy-seven percent in 2013, Americans increasingly regard marijuana as having legitimate medical uses.

In the six states with prohibitions against discrimination, medical marijuana users enjoy varying degrees of protection. The medical marijuana law in Maine prohibits employers from refusing to employ or “otherwise penaliz[ing] a person solely for that person’s status as a qualifying patient . . . .” Connecticut, Illinois, and Rhode Island’s laws all contain similar provisions. The laws in Arizona and Delaware provide an additional layer of protection, barring discrimination based on a “positive drug test for marijuana metabolites or components” by a medical marijuana user, as well as status.

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33 Emerald Steel Fabricators, Inc., 348 Or. at 171.
34 348 Or. at 171.
35 348 Or. at 178.
36 348 Or. at 178.
37 348 Or. at 178.
38 348 Or. at 178.
39 348 Or. at 170, 186.
40 348 Or. at 189.
41 348 Or. at 189.
42 Casias, 695 F.3d at 436; Roe, 171 Wash. 2d at 758-59; Ross, 42 Cal. 4th at 931-33.
45 A.R.S. § 36-2813B(1), (2); C.G.S.A. § 21a-408p(3); 16 Del. C. § 4905A(a)(3)(a), (b); 410 I.L.C.S. § 130/50(f); M.R.S.A. § 2426(2)(B); R.I.G.L. § 21-28-6-7.
47 R.I.G.L. § 21-28.6-4(c).
48 C.G.S.A. § 21a-408p(b)(3); 410 I.L.C.S. § 130/40; 22 M.R.S.A. § 1212-E(2).
49 A.R.S. § 36-2813B(1), (2); 16 Del. C. § 4905A(a)(3)(a), (b).
Through statutory exceptions, these states do provide employers with some leeway. In all six states, an employer may discipline a medical user for on-the-job marijuana use. Identical provisions in Arizona and Delaware’s laws prohibit discrimination for a positive marijuana test “unless the patient used, possessed, or was impaired by marijuana on the premises of the place of employment or during the hours of employment.”55 Illinois, and Maine’s laws provide a similar exception for use and impairment, while employers in Rhode Island are not required “to accommodate the medical use of marijuana in any workplace.”56

Illinois’ medical marijuana law provides employers with additional leeway by permitting employers to enforce drug policies against medical users. In addition to permitting employers to “adopt[] reasonable regulations concerning the consumption, storage, or timekeeping requirements” for medical users, the law permits employers to “enforce[] a policy concerning drug testing, zero-tolerance, or a drug free workplace provided the policy is applied in a nondiscriminatory manner.”54 The law further provides that employers may “disciplin[e] . . . registered qualifying patient[s] for violating a workplace drug policy.”55 Thus, provided the employer treats all registered qualifying patient[s] for violating a workplace drug policy, and lists specific examples of symptoms.53

Illinois’ law defines impairment as “manifest[] specific, articulable symptoms while working that decrease or lessen his or her performance of the duties or tasks of the employee’s job position . . . .” and Illinois employers with workplace drug policies against medical users. In addition to permitting employers to “adopt[] reasonable regulations concerning the consumption, storage, or timekeeping requirements” for medical users, the law permits employers to “enforce[] a policy concerning drug testing, zero-tolerance, or a drug free workplace provided the policy is applied in a nondiscriminatory manner.”54 The law further provides that employers may “disciplin[e] . . . registered qualifying patient[s] for violating a workplace drug policy.”55 Thus, provided the employer treats all drug users consistently, Illinois employers with workplace drug policies that cover marijuana use may discipline medical users for noncompliance.

In addition, with the exception of Rhode Island, all the states with anti-discrimination provisions permit discrimination if failing to do so would cause an employer to lose benefits under federal law, such as a federal license or funding.56 This exception allows employers to comply with federal drug testing regulations, including Department of Transportation (“DOT”) and Department of Defense regulations that require the testing of certain employees.57 With respect to its regulation of marijuana use by “safety-sensitive transportation employees”58 ranging from school bus drivers to aircraft maintenance personnel, the DOT issued a memorandum in 2009 that made clear that medical marijuana use is not “a valid medical explanation for a transportation employee’s positive drug test result.”

The exception for federal benefits also permits federal contractors and grant recipients to comply with Drug-Free Workplace Act (“DFWA”) of 1988, to the extent there is a conflict. As the dissent in Ross explained, though the DFWA requires employers to discipline or mandate rehabilitation for employees who violate criminal drug statutes, these requirements only apply if that violation occurs within the workplace.59 All six anti-discrimination provisions carve-out marijuana use in the workplace from their coverage. It is thus unlikely that the DFWA and the anti-discrimination provisions would pose an actual conflict.60

50 A.R.S. § 36-2813B(2).
51 C.G.S.A. § 21a-408p(3); 410 I.L.C.S. § 130/50(f); M.R.S.A. § 2426(2)(B); R.I.G.L. § 21-28.6-7.
52 410 I.L.C.S. § 130/50(g)(3).
53 410 I.L.C.S. § 130/50(g)(1)-(2), (f) (listing as symptoms “the employee’s speech, physical dexterity, agility, coordination, demeanor, irrational or unusual behavior, negligence or carelessness in operating equipment or machinery, disregard for the safety of the employee or others, or involvement in an accident that results in serious damage to equipment or property, disruption of a production or manufacturing process, or carelessness that results in any injury to the employee or others”).
54 410 I.L.C.S. § 130/50(a)-(b).
55 410 I.L.C.S. § 130/50(c).
56 A.R.S. § 36-2813B; C.G.S.A. § 21a-408p(b); 16 Del. C. § 4905A(a)(3); 410 I.L.C.S. § 130/50(d); 22 M.R.S.A. § 2423-E(2).
60 Ross, 42 Cal. 4th at 939 (Kennard, J., dissenting) (explaining that “[t]he drug-free workplace laws are not concerned with employees’ possession or use of drugs like marijuana away from the jobsite, and nothing in those laws would prevent an employer that knowingly accepted an employee’s use of marijuana as a medical treatment at the employee’s home from obtaining drug-free workplace certification”).
A chart summarizing state statutory provisions legalizing marijuana use for one purpose or another follows:

<table>
<thead>
<tr>
<th>State</th>
<th>Protective Language</th>
<th>On-premises use or impairment exception</th>
<th>Compliance with federal law exception</th>
<th>Additional exceptions</th>
<th>Other limitations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arizona</td>
<td>“[A]n employer may not discriminate against a person in hiring, termination or imposing any term or condition of employment or otherwise penalize a person based upon either: (1) [t]he person’s status as a cardholder. (2) A registered qualifying patient’s positive drug test for marijuana components or metabolites.” A.R.S. § 36-2813B.</td>
<td>Yes. A.R.S. §§ 36-2814B, A(3). This exception is subject to the caveat that an employee “shall not be considered to be under the influence of marijuana solely because of the presence of metabolites or components of marijuana that appear in insufficient concentration to cause impairment.”</td>
<td>Yes. A.R.S. § 36-2813B.</td>
<td>None.</td>
<td>None.</td>
</tr>
<tr>
<td>Connecticut</td>
<td>“No employer may refuse to hire a person or may discharge, penalize or threaten an employee solely on the basis of such person’s or employee’s status as a qualifying patient or primary caregiver.” C.G.S.A. § 21a-408p(b).</td>
<td>Yes. C.G.S.A. § 21a-408p(b)(3).</td>
<td>Yes. C.G.S.A. § 21a-408p(b).</td>
<td>None.</td>
<td>None.</td>
</tr>
<tr>
<td>Delaware</td>
<td>“[A] employer may not discriminate against a person in hiring, termination, or any term or condition of employment, or otherwise penalize a person, if the discrimination is based upon either of the following: (a) [t]he person’s status as a cardholder; or (b) [a] registered qualifying patient’s positive drug test for marijuana components or metabolites.” 16 Del.C. § 4905A(a)(3).</td>
<td>Yes. 16 Del.C. § 4905A(a)(3) (b).</td>
<td>Yes. 16 Del.C. § 4905A(a)(3).</td>
<td>None.</td>
<td>- An employer may not be penalized or denied a benefit under state law for employing a medical user. 16 Del.C. § 4905A(c).</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>“No . . . employer . . . may . . . penalize, a person solely for his or her status as a registered qualifying patient or a registered designated caregiver.” 410 I.L.C.S. § 130/40(a)(1).</td>
<td>Yes. 410 I.L.C.S. §§ 130/40(e), 130/50(g)(1)-(2).</td>
<td>Yes. 410 I.L.C.S. §§ 130/40(a)(1), 130/50(d), (b).</td>
<td>An employer may adopt[] reasonable regulations concerning the consumption, storage, or timekeeping requirements” for medical users. 410 I.L.C.S. § 130/50(a). - An employer may enforce a “drug testing, zero-tolerance, or drug free workplace” policy against a medical user, provided the policy is applied in a nondiscriminatory manner.” 410 I.L.C.S. § 130/50(b).</td>
<td>An employer may not be denied a benefit under state law for employing a medical user. 410 I.L.C.S. § 130/40(c). - The statute provides that it does not “create or imply a cause of action” against an employer for “injury or loss to a third party if the employer neither knew nor had reason to know that the employee was impaired.” 410 I.L.C.S. § 130/50(g)(3).</td>
</tr>
</tbody>
</table>
Potential for Federal Law to Preempt Statutory Exemptions

Federal law may preempt the state anti-discrimination provisions altogether, relieving employers of any obligation to accommodate medical users. Indeed, the anti-discrimination provisions ask employers to accommodate an activity that is illegal under federal law. As noted above, the Oregon Supreme Court in Emerald has already concluded that Oregon law’s affirmative authorization of marijuana use for medical purposes stood as an obstacle to the CSA’s prohibition on such use. It follows that a state law requiring employers to accommodate medical marijuana use may be preempted as well.

The anti-discrimination provisions have yet to be tested in court. A federal lawsuit in Maine, Thomas v. Adecco USA, Inc., came close, as the employer there moved to dismiss on the grounds that the CSA, ADA, and the Federal Food, Drug and Cosmetic Act all preempted a medical user’s discrimination claim under Maine law. Before the court resolved the motion to dismiss, however, the parties reached an out-of-court settlement.

Comment

Though it is impossible to predict, at this relatively early stage in what is certain to be years of litigation challenging adverse employment actions resulting from the “legal” use of marijuana, how the law will ultimately develop, two points are worth noting. First, current law recognizes that an employer may discharge an employee impaired to the extent of being unable to satisfactorily perform his or her job functions, even in states that provide employment protections for medical marijuana use. Second, the employment issues arising out of impairment from the legal use of marijuana are similar, though not identical, to those arising out of impairment from the legal use of alcohol. The appropriate employer response to alcohol impairment is now generally established. Until developments dictate otherwise, employers seeking to accommodate medical marijuana use may use their alcohol related policies in guiding their response.

While employers may, at least for the time being, feel secure in administering discipline for marijuana use that impairs the ability of an employee to perform his or her job, other issues are more difficult. For example, may an employer discipline an employee for known marijuana use that has not been proven to affect job performance? Does the answer to the foregoing question differ if the marijuana use is: prescribed by a doctor; legal under...
a state medical marijuana law; or protected by a state anti-
discrimination law?

Another decade may be required before judicial and legis-
lative initiative clarify the answers.

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Supreme Court to Decide Public Employee’s First Amendment Retaliation Case

By Kevin M. Cox

Introduction
On January 17, 2014, the Supreme Court granted certiorari in a potentially significant public employee free speech case. The case arises out of a short and unpublished Eleventh Circuit decision in Lane v. Central Alabama Community College. Lane involves a public employee’s First Amendment rights in the context of retaliation under 42 U.S.C. § 1983, and raises questions about the federal appellate courts’ conflicting interpretation of the Court’s decision in Garcetti v. Ceballos.

The Supreme Court will consider whether a state employee who claims that he was fired by an Alabama community college because he testified under subpoena in a federal criminal trial against a state legislator raises a First Amendment retaliation claim for damages under Section 1983. The case will test the boundaries of Garcetti, a decision that limited the scope of public employees’ protected speech. Garcetti was relied on by both the district court and the Eleventh Circuit in finding that Lane failed to establish a prima facie case of retaliation.

What Does Section 1983 Say?
42 U.S.C. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The Facts of Lane
In 2006, Edward Lane accepted a probationary position as Director of the Community Intensive Training for Youth (“CITY”) program at Central Alabama Community College (“CACC”). Soon after assuming his duties, he discovered that an Alabama state representative, Suzanne Schmitz (“Schmitz”) was being paid to work for CITY even though she actually performed no work at all. He raised these concerns internally but was warned that terminating Schmitz would cause problems. He raised these concerns to Schmitz, who refused to report to work.

Nevertheless, despite warnings by CACC’s then-president Steve Franks and by corporate counsel that terminating Schmitz could have “negative repercussions” for both Lane and CACC, Lane fired Schmitz. In response, Schmitz filed a lawsuit seeking reemployment and reportedly commented that she planned to “get [Lane] back” for terminating her.

Soon after Schmitz was terminated, the FBI began investigating her for mail fraud and fraud involving a program receiving federal funds. The FBI contacted Lane for information. Lane cooperated with the FBI and he ultimately testified against Schmitz before a federal grand jury and — pursuant to subpoenas — in

1 Lane v. Franks, 2014 U.S. LEXIS 1895 (March 10, 2014).
2 The eight page opinion was a part of the Eleventh Circuit’s summary calendar. It was decided without oral argument and designated as “do not publish.”
3 523 Fed. Appx. 709 (11th Cir. 2013).
two criminal trials in August 2008 and February 2009. Schmitz was convicted and sentenced to 30 months in prison.

In late 2008, due to substantial budget cuts resulting from the collapse of the U.S. economy, Lane and Franks began discussing the possibility of employee layoffs, including the lay-off of all probationary employees. In January 2009 (four months after testifying at Schmitz’s first criminal trial and one month prior to testifying at her second criminal trial), Franks sent termination letters to 29 CITY employees with less than 3 years of service, which included Lane. Franks rescinded nearly all of those letters a few days later; however, Lane was one of only two employees whose termination was not rescinded. According to Franks, he rescinded the majority of the terminations after discovering that many of the CITY employees were not in fact probationary.

Lane sued Franks in his individual and official capacities in a lawsuit that included a Section 1983 claim alleging that Franks terminated Lane in retaliation for testifying against Schmitz, in violation of the First Amendment. The United States District Court for the District of Alabama granted Franks’ motion for summary judgment. Although the district court couched its decision in terms of qualified immunity, it determined that Lane’s speech was made pursuant to his official duties as CITY’s Director, not as a citizen on a matter of public concern. Rather, Lane was acting pursuant to his official duties when he discovered that Schmitz was not doing work, when he terminated her employment, and when he testified pursuant to subpoena. Accordingly, the district court held that the First Amendment did not apply to protect Lane. Lane appealed and the Eleventh Circuit affirmed.

The Eleventh Circuit’s Decision

The Eleventh Circuit began its analysis by confirming that to establish a claim of retaliation for protected speech under the First Amendment, a public employee must show, among other things, that he “spoke as a citizen on a matter of public concern.” The court cited Garcetti v. Ceballos, which stands for the proposition that a government employee whose speech is made pursuant to his official duties is not speaking as a citizen. Next, the court confirmed that:

> [even if an employee was not required to make the speech as part of his official duties, he enjoys no First Amendment protection if his speech “owes its existence to [the] employee’s professional responsibilities” and is “a product that the employer itself has commissioned or created.”]

The Eleventh Circuit had previously determined that a police officer’s speech — which consisted of the officer’s accident report and his subpoenaed deposition testimony made in conjunction with judicial proceedings, reiterating the observations made in his accident report — was not entitled to First Amendment protection. The officer prepared his accident report in the normal course of his official duties; therefore, the report did not constitute speech “made primarily in the employee’s role as citizen.”

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13 523 Fed. Appx. at 710.
14 Schmitz’s convictions for fraud regarding receiving federal funds were ultimately reversed by the Eleventh Circuit because of prosecutorial misconduct, but her convictions for mail fraud were affirmed. She is no longer in prison.
15 Lane, 523 Fed. Appx. at 710.
16 523 Fed. Appx. at 710.
17 523 Fed. Appx. at 710.
18 523 Fed. Appx. at 710.
19 Lane abandoned the following claims on appeal: (1) his claims against CACC; (2) his claims for violation of the Alabama State Employee Protection Act, Ala. Code § 36-26A-3; (3) his claims for violation of 42 U.S.C. § 1985; and (4) his claim for money damages against Franks in his official capacity.
20 Lane, 523 Fed. Appx. at 710.
21 523 Fed. Appx. at 711.
22 523 Fed. Appx. at 711.
23 523 Fed. Appx. at 711.
24 523 Fed. Appx. at 711.
26 See 523 Fed. Appx. at 711.
27 Garcetti, 126 S. Ct. at 1960. See also Battle v. Bd. of Regents, 468 F.3d 755, 760 (11th Cir. 2006). Whether Lane’s speech was made as a citizen or as part of his job responsibilities is a question of law for the court to decide. See Vila v. Padron, 484 F.3d 1334, 1339 (11th Cir. 2007). In determining whether Lane’s speech was protected by the First Amendment, courts will “look to the content, form, and context of a given statement, as revealed by the whole record.” Abdur-Rahman v. Walker, 567 F.3d 1278, 1283 (11th Cir. 2009).
28 Lane, 523 Fed. Appx. at 711 (quoting Abdur-Rahman, 567 F.3d at 1286).
29 Morris v. Crow, 142 F.3d 1379 (11th Cir. 1998).
30 142 F.3d at 1382.
Further, because the officer’s deposition testimony was given merely “in compliance with a subpoena to testify truthfully” — and not as a “public comment on sheriff’s office policies and procedures, the internal workings of the department, the quality of its employees or upon any issue at all” — it was unprotected under the First Amendment.31 Other circuits, however, have reached a different conclusion.32

The court found it pertinent that no one disputed that Lane was acting pursuant to his official duties as CITY’s Director when he investigated Schmitz’s work activities, spoke with Schmitz and other CACC officials about Schmitz’s employment, and ultimately terminated Schmitz.33 It then held that Lane testifying about his official activities pursuant to a subpoena and in the litigation context, in and of itself, did not bring his speech within the protection of the First Amendment.34 Furthermore, because formal job descriptions do not control, that Lane’s official duties did not distinctly require him to testify at criminal trials fell short of triggering First Amendment protection.35

Although not dispositive, the court also considered it pertinent that the subject matter of Lane’s testimony touched only on acts he performed as part of his official duties.36 Nothing evidenced that Lane testified at Schmitz’s trial “primarily in [his] role as a citizen” or that his testimony was an attempt to publicly comment on CITY’s internal operations.37

In the light of Eleventh Circuit precedents, the record failed to establish that Lane had testified as a citizen on a matter of public concern.38 As a matter of law, the court decided that he could not state a claim for retaliation under the First Amendment.39

**Issues Raised by Lane on Certiorari**

1. Whether the government is categorically free under the First Amendment to retaliate against a public employee for truthful sworn testimony that was compelled by subpoena and was not a part of the employee’s ordinary job responsibilities?

2. Whether qualified immunity precludes a claim for damages in such an action?

**Why Grant the Writ of Certiorari?**

Although the Eleventh Circuit had little trouble in deciding that a public employee’s subpoenaed testimony about speech made pursuant to his official duties is not protected by the First Amendment, interpretations of *Garcetti* have caused some consternation among the federal appellate courts. For example, there is the arguable circuit split between *Bowie v. Maddox*,40 from the D.C. Circuit (foreclosing the employee’s claim) and *Jackler v. Byrne*,41 in the Second Circuit (permitting the employee’s claim). Two years ago the Supreme Court denied petitions for writs of certiorari in these cases.

In his petition for review, Lane stated that the Eleventh Circuit’s ruling that a public employee’s subpoenaed testimony does not enjoy First Amendment protection is a “uniquely restrictive interpretation” that conflicts with contrary decisions from three other federal circuits. His petition argued that:

> The fact that those courts have decided multiple cases specifically rejecting the rationale adopted by the Eleventh Circuit demonstrates that the conflict is intractable and cannot be resolved without this [Supreme] Court’s intervention.

Certainly *Lane* raises vexing issues of the First Amendment rights of employees after *Garcetti*, as well as possible First Amendment protections for government “whistle-blowers.” It is difficult to believe that misconduct by a state lawmaker is not a “matter of public concern,”

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31 142 F.3d at 1382-83 (“The mere fact that [the police officer’s] statements were made in the context of a civil deposition cannot transform them into constitutionally protected speech.”).
32 See Morales v. Jones, 494 F.3d 590, 598 (7th Cir. 2007) (concluding that a public employee’s subpoenaed deposition testimony about speech he made pursuant to his official duties was protected by the First Amendment); Reilly v. City of Atlantic City, 532 F.3d 216 (3d Cir. 2008) (explaining that a police officer’s trial testimony was protected by the First Amendment because, although the testimony stemmed from the officer’s official duties, the officer had an “independent obligation as a citizen to testify truthfully.”). *Morris*, however, is the law in the Eleventh Circuit on the question of public employee speech per a subpoena in the context of judicial proceedings.
33 *Lane*, 523 Fed. Appx. at 712.
37 523 Fed. Appx. at 712.
38 523 Fed. Appx. at 712.
40 642 F.3d 1122 (D.C. Cir. 2011).
41 658 F.3d 225 (2d Cir. 2011).
although Lane clearly only learned of the misconduct in the course and scope of his employment.

*Lane* also does not specifically deal with alleged retaliation arising out of Lane’s internal report about Schmitz, which is most certainly speech pursuant to his official duties under *Garcetti*. Instead, the case deals with a government employee’s subpoenaed testimony, which some consider to be the speech of a citizen on a matter of public concern.

Lane failed to establish a *prima facie* case of retaliation; therefore, the Eleventh Circuit did not address nor decide Franks’ defense of sovereign immunity and it declined the opportunity to reach a decision on the qualified immunity question. Instead, it held that the First Amendment did not protect Lane’s testimony because it was made pursuant to his official duties as a public employee.

In opposing review, Franks argued that the Supreme Court should decline to reach the First Amendment issue because both sovereign and qualified immunity “clearly bar” Lane’s suit for damages. Franks wrote in opposition to review:

This is because, at the very least, [Franks] was not on fair notice, and [Lane] has never shown, that it was clearly established at the time of [Lane’s] August 2008 testimony that (1) [his] testimony was not made pursuant to his official duties as director of CITY but rather was citizen speech protected by the First Amendment, and (2) that testimony pursuant to a subpoena is always protected.

Franks also argued that even if the Supreme Court considers the First Amendment issue, the Eleventh Circuit’s conclusions — that Lane’s speech was “made pursuant to his duties” as CITY director and that his written job description did not control that inquiry — are consistent with *Garcetti* and raise no issue warranting review. It is expected that the case will be briefed, argued and decided by the Court this Term.

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The Constitutional Right of a Religious Organization to Avoid Discrimination Laws

By N. Peter Lareau

Introduction

While employed as a security guard at St. Joseph Hospital in Tacoma, Washington, a facility owned by the Franciscan Health System ("FHS"), Larry Ockletree, an African-American, suffered a stroke. Because the Hospital believed that the stroke left him incapable of performing his job, it terminated Ockletree’s employment. Ockletree then filed suit in Washington state court against FHS, alleging that his termination was based on his race and/or disability and violated the Washington Law on Discrimination ("WLAD"), as well as federal law.

FHS removed the suit to the United States District Court for the Western District of Washington and moved to dismiss the WLAD claim, arguing, in part, that, as a nonprofit religious organization, it was expressly exempt from the law. Ockletree countered that the exemption set forth in the WLAD was invalid under both the Washington and the United States Constitutions. In considering the issues, the federal court observed that it would not have jurisdiction over Ockletree’s claims under Title VII unless he had exhausted his administrative remedies. Because the record evidence showed that Ockletree had filed his charge with the EEOC 189 days after his discharge, the timeliness of filing depended on whether, in the words of the federal court:

Ockletree can ... take advantage of the longer, 300-day filing period, [that applies] if there is a state agency with subject matter jurisdiction over the charge. In other words, the viability of his federal claims depends on his ability to assert a state law WLAD claim against FHS. If FHS is exempt from WLAD as a religious non-profit organization, then Ockletree’s WLAD claim fails, and his federal claims may be time barred.

Ockletree argued that the WLAD’s religious exemption violates the Washington State Constitution’s privileges and immunities clause and its religious freedom clause because the discrimination he alleged is unrelated to FHS’s religious purposes, practices, or activities. Noting that the Washington Supreme Court had not yet decided whether the WLAD’s exemption for nonprofit religious organizations withstood scrutiny under the State’s Constitution, the federal court certified two questions to the State’s Supreme Court:

1. The Washington Law Against Discrimination excludes religious non-profit organizations from its definition of “employer” (Wash. Rev. Code § 49.60.040(11)). Such entities are therefore facially exempt from the WLAD’s prohibition of discrimination in the workplace. Does this exemption violate Wash. Const. Article I, § 11 or § 12?

2. If not, is Wash. Rev. Code § 49.60.040(11)’s exemption unconstitutional as applied to an employee claiming that the religious non-profit organization discriminated against him for reasons wholly unrelated to any religious purpose, practice, or activity?

Relevant Statutory and Constitutional Provisions

Washington Law against Discrimination

The WLAD was enacted in 1949 and prohibited discrimination “on the basis of race, creed, color, or national origin.” It currently also precludes discrimination based on age, sex, sexual orientation, and disability. Originally the WLAD’s definition of “employer” excluded “any religious, charitable, educational, social or fraternal association or corporation, not organized for private profit.” Under an amendment adopted in 1957 that remains in effect today:

“Employer” includes any person acting in the interest of an employer, directly or indirectly, who employs eight

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1 Wash. Rev. Code ch. 49.
3 2014 Wash. LEXIS 76, at *3.
5 2012 U.S. Dist. LEXIS 185828, at *3.
8 2014 Wash. LEXIS 76, at *4 (quoting Griffin v. Eller, 130 Wn.2d 58, 63, 922 P.2d 788 (1996)).
9 2014 Wash. LEXIS 76, at *8.
10 2014 Wash. LEXIS 76, at *5 (quoting Laws of 1949, ch. 183, § 3(b)).
or more persons, and does not include any religious or sectarian organization not organized for private profit.11

**Article I, section 12, Washington Constitution**

Article I, section 12 of the Constitution of the State of Washington provides:

No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.

**Article I, section 11, Washington Constitution**

Article I, section 11 of the Constitution of the State of Washington provides in pertinent part:

No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment.

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11 2014 Wash. LEXIS 76, at *5 (quoting RCW 49.60.040(11)).
12 Justice Johnson wrote the opinion of the Court, which was joined by Chief Justice Madsen and Justices Owen and Johnson. Justice Wiggins concurred in part.
13 The federal equal protection clause provides: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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14 Ockletree v. Franciscan Health Sys., 2014 Wash. LEXIS 76, at *8 (emphases supplied).
17 2014 Wash. LEXIS 76, at *12.
18 2014 Wash. LEXIS 76, at *12 (quoting State v. Vance, 29 Wash. 435, 458, 70 P. 34 (1902)).
20 2014 Wash. LEXIS 76, at *13.

(Pub. 1239)
Ockletree also argued that a State citizen’s right to be free from discrimination in private employment is a “fundamental right” defined by the Court. The Court disagreed:

Because discrimination in private employment cannot “be said to come within the prohibition of the constitution,” it is not a fundamental right.

Rather, protection from discrimination in private employment is a creature of statutory enactment.21

The Court further supported that conclusion by observing that, if it accepted Ockletree’s contention that freedom from discrimination is a fundamental right, it “would be implicitly embracing strict scrutiny for analyzing the exemption under the federal equal protection clause[]”—“at odds with our analysis and conclusion in Griffin.”22

Taking a slightly different tack, Ockletree argued that the exemption for religious organization implicates the fundamental right to carry on a business. Again, the Court disagreed:

Ockletree fails to establish how RCW 49.60.040(11) confers a benefit to religious nonprofits at the expense of other organizations that are subject to WLAD. While Ockletree asserts that religious nonprofits are not subject to “liability for damages under WLAD or the costs attendant on statutory compliance,” he fails to show how secular employers who are subject to the antidiscrimination law bear any greater expense or costs because religious nonprofits are exempt, and we find no basis to support that argument. Thus, the exemption does not offend the anticompetitive concerns underlying article I, section 12. Moreover, nonprofits run by religious organizations were not the type of powerful business interests that the framers of article I, section 12 had in mind when drafting that section. As Ockletree acknowledges, article I, section 12 was historically applied “‘in a manner consistent with its aim of eliminating governmental favoritism toward certain business interests.’”23

“Reasonable Ground” for the Exemption

Assuming (contrary to its decision) that the exemption implicated a privilege or immunity, the Court considered whether there was a “reasonable ground” for the classification and concluded that there was. The Court utilized a two-part test: (1) “whether the law applies equally to ‘all persons within a designated class,’” and (2) “whether there is a ‘reasonable ground for distinguishing between those who fall within the class and those who do not.’”24

Because no one disputed that the exemption applies equally to all religious nonprofits, the Court looked to whether the legislature had a “reasonable ground” to distinguish between religious and secular nonprofits.

It found that reasonable ground in the level of religious freedom accorded under Article I, section 11 of the State’s Constitution, which “provides greater protection for the free exercise of religion than the First Amendment[]”25 of the federal constitution. Therefore, said the Court:

the religious employer exemption satisfies the reasonable ground test because it similarly accommodates the broad protections to religious freedoms afforded by Washington’s article I, section 11. The legislature gives effect to these protections by choosing to avoid potential entanglements between the state and religion that could occur in enforcing WLAD against religious nonprofits.26

At the same time, the lead opinion was careful to note that the free exercise clause did not require the grant of the exemption:

It is worth stressing that we do not hold that the state free exercise clause requires such a broad exemption for religious organizations under WLAD, rather we hold only that a reasonable ground exists to distinguish between religious and secular organizations based on the potential for government interference with religious freedoms in enforcing WLAD against religious nonprofits.27

Validity under Establishment Clause

As noted above, Article I, section 11 of the State’s Constitution provides, in part: “No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment.” In considering whether the exemption ran afoul of this clause, the Court applied a two-part test:

(1) Is “public money or property” involved? and (2) If so, is it to be “appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment”?28
Because the exemption provided no direct benefit to religious organizations and the Court had previously held that indirect benefits do not violate the Constitution, it held that the first part of the test answered its inquiry and that it need not address the second part.

**Answers to Certified Questions**

The Court responded to the certified questions as follows:

1. WLAD’s definition of “employer” under RCW 49.60.040(11) does not involve a privilege or immunity, and therefore does not violate article I, section 12’s privileges and immunities clause.

2. WLAD’s definition of “employer” under RCW 49.60.040(11) does not involve the appropriation of money or application of property, and therefore does not fall within the prohibition of article I, section 11’s establishment clause.

**Dissenting Opinion**

Generally

Four Justices, believing that the lead opinion deprived the: "privileges and immunities clause of its intended meaning by disclaiming any limits on the ability of religious-affiliated corporations to engage in discrimination unrelated to their religious beliefs or practices,[]" dissented. The dissent states:

The broad exemption of religious nonprofit corporations from Washington’s Law Against Discrimination (WLAD), at RCW 49.60.040(11), cannot constitutionally be applied to allow race or disability discrimination against a hospital security guard. Because such discrimination is not protected as part of religious exercise and indeed violates the federal First Amendment establishment clause, it cannot satisfy the “reasonable ground” standard under article I, section 12. I would hold the exemption violates this provision as applied to WLAD claims based on discrimination that is unrelated to an employer’s religious purpose, practice, or activity, and answer yes to certified question number 2, as to article I, section 12.32

**Standard of Review**

The dissent maintains that the lead opinion erred in finding that the right to be free from discrimination in employment, while important, was not a “fundamental right” protected by the privileges and immunities clause. It asserts that the “fundamental rights” referred to in the privileges and immunities clause are not coextensive with the fundamental rights recognized under the federal due process clause:

Washington’s privileges and immunities clause guarantees equal protection of the laws, but also protects those “fundamental rights which belong to the citizens of the state by reason of such citizenship.” This court has never suggested that these rights are limited to those deserving heightened scrutiny under federal law. Rather, these rights are more prosaic than the “fundamental rights” guaranteed by due process. . . .33

The dissent asserts:

The WLAD exemption is subject to heightened scrutiny if it grants a privilege or immunity of state citizenship to religious nonprofits. Whether the statute also infringes liberty interests protected by due process is irrelevant to its status under article I, section 12.34

**The Exemption Implicates a Privilege or Immunity Protected by Article I, Section 12**

Conceding the correctness of the lead opinion’s assertion that “not every statute favoring one class of employers over another grants a ‘privilege or immunity’ under article I, section 12[,]”35 the dissent maintains that “article I, section 12 protects the broad privilege of Washington citizens to bring claims in state court[.]”36 and that “employment free from discrimination rests at the core of the sort of ‘personal rights’ this court . . . identified as fundamental.”37 Accordingly, it:

would recognize that exempting nonprofit religious employers from WLAD claims bestows a

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29 Ockletree had argued that the exemption provides indirect financial support to religious nonprofits by relieving them “from the necessary financial costs of compliance with WLAD and potential damages for violation.” 2014 Wash. LEXIS 76, at *28-29.

30 Justice Stephens authored a dissent that was joined by Justices Fairhurst, González and McCloud.

31 Ockletree, 2014 Wash. LEXIS 76, at *32.

32 2014 Wash. LEXIS 76, at *32 (footnote omitted).

33 2014 Wash. LEXIS 76, at *38-39 (citation and some internal quotation marks omitted).

34 2014 Wash. LEXIS 76, at *40.

35 2014 Wash. LEXIS 76, at *40.

36 2014 Wash. LEXIS 76, at *41.

37 2014 Wash. LEXIS 76, at *42.
“privilege” or “immunity” on them within the meaning of the article I, section 12 privileges and immunities clause.38

“Reasonable Ground” for Exemption: Economic and Regulatory Considerations

The dissent opines that the “reasonable ground” analysis utilized under the State privileges and immunities clause, though similar, is not identical to “rational basis” review under the federal Constitution.39 The question before it, the dissent observes, is not whether the legislature could have reasonably exempted all nonprofit employers (both religious and secular)40 but whether identifying only religious nonprofits “is justified by some ‘reasonable and just difference’ between the two types of employers.”41

It notes that the burden of state regulation upon nonprofits with respect to discrimination claims arises not out of the mission of nonprofit entities but their structure and financing.42 FHS and the amici arguing in favor of the exemption pointed out that the exemption enables FHS and other religious nonprofits to better serve the public good. The lead opinion agrees but observes that the argument applies with equal force to other nonprofits.43 The dissent concludes that there is no economic or regulatory distinction between religious and secular nonprofits that legitimizes the extension of the exemption only to religious nonprofits.44

“Reasonable Ground” for Exemption:

Religious Considerations

The lead opinion found reasonable ground for the exemption in State Constitution’s free exercise clause and the avoidance of “potential entanglements between the state and religion.” The dissent maintains that the lead opinion’s reliance on the free exercise clause as support for the exemption in fact precludes the conclusion it reached. Quoting from the Supreme Court’s opinion in Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 15 (1989), the dissent states:

A law that grants a special privilege to religious organizations is unconstitutional if it “is not required by the Free Exercise Clause and . . . either burdens nonbeneficiaries markedly or cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion.”45

The dissent argues that, at least as applied to Ockltree, the exemption is unconstitutional because it not required by the free exercise clause (as the lead opinion concedes) and does not remove a state-imposed deterrent on the exercise of religion:

As applied to Ockltree, the WLAD exemption immunizes FHS from potential liability for employment discrimination based on grounds unrelated to its religious beliefs or practice. The exemption is not necessary to satisfy FHS’s free exercise right and does not alleviate a substantial state-imposed burden on religious freedom. Consequently, it exceeds the limits of an accommodation of religion and violates the federal establishment clause. Because it is unconstitutional under the First Amendment, the distinction WLAD draws between religious and secular nonprofit employers cannot be “natural, reasonable, or just” under article I, section 12. I would hold it is invalid as applied to Ockltree and all similarly situated plaintiffs.46

Concurring and Dissenting Opinion

Justice Wiggins concurs in the lead opinion’s conclusion that the exemption is not facially unconstitutional but would hold that it is unconstitutional as applied to Ockltree.47 He explains:

the exemption is reasonable only to the extent that it relates to employees whose job responsibilities relate to the organization’s religious practices. When the exemption is applied to a person whose job qualifications and responsibilities are unrelated to religion, there is no reasonable ground for distinguishing between a religious organization and a purely secular organization. Therefore, I agree with the dissent that the exemption is invalid when applied to an employee like Ockltree, assuming that there is no relationship between his duties and religion or religious practices.48

38 2014 Wash. LEXIS 76, at *45.
39 2014 Wash. LEXIS 76, at *45.
40 2014 Wash. LEXIS 76, at *47. The Court states that, because discrimination suits place a heavy financial burden on often “fragile” nonprofit employers, the legislature “could reasonably exempt nonprofits from WLAD[.]” 2014 Wash. LEXIS 76, at *48.
41 2014 Wash. LEXIS 76, at *48.
42 2014 Wash. LEXIS 76, at *48.
43 2014 Wash. LEXIS 76, at *48-49.
44 2014 Wash. LEXIS 76, at *50.
45 2014 Wash. LEXIS 76, at *58.
46 2014 Wash. LEXIS 76, at *57-58 (citations and footnote omitted).
47 2014 Wash. LEXIS 76, at *59-60.
48 2014 Wash. LEXIS 76, at *62.
Comment
The decision of the Washington Supreme Court in this case represents a setback for Ockletree and a victory for the Franciscan Health System and religious organizations within the State of Washington, generally. But that setback/victory may be ephemeral. The case will now return to the federal court which still has to decide whether the exemption for religious organizations under the WALD passes muster under the federal Constitution. The federal court will be bound by the Washington Supreme Court’s conclusion as to the constitutionality of the exemption under State law. But as that Court noted:

If there is no privilege or immunity involved, this leaves only the question of whether the challenged statute violates the equal protection clause of the federal constitution.49

And on that issue, the Washington Supreme Court expressed no opinion.50

More generally, the issue of the exemption of religious organizations from discrimination laws, on both the federal and state levels, is one with which the courts are currently wrestling and will likely continue to confront in the future. Although the exemption in Ockletree arose out of an express constitutional provision, in Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC,51 the Supreme Court unanimously decided that the First Amendment’s establishment and free exercise clauses create an implied “ministerial exception” that barred a discrimination lawsuit brought against a religious organization by a former elementary school teacher who was a Lutheran “commissioned minister.”52 The Court in that case provided no guidance for determining whether the employee of a religious organization is a “minister” as to which the organization is entitled to an exemption.

However, shortly after deciding Hosanna-Tabor, the Court denied certiorari petitions in two other ministerial exception cases — Skrzypczak v. Roman Catholic Diocese of Tulsa,53 and Weishuhn v. Catholic Diocese of Lansing.54 In Skrzypczak, the Tenth Circuit found that Skrzypczak’s duties as the director of the diocese’s department of religious formation placed her within the ministerial exception. In Weishuhn the Michigan Court of Appeals affirmed a decision that Weishuhn was a minister subject to the exception because she incorporated religious teachings into her secular classes. And, in Cannata v. Catholic Diocese of Austin,55 decided after Hosanna-Tabor, the Fifth Circuit held that a church’s music director was covered by the exemption.

In each of those cases, an inquiry was made by the courts as to the extent of the claimant’s religious functions and secular functions. And, although no specific such inquiry was made by the Court in Ockletree, it is clear that each of the opinions subsumes the result of such an inquiry by the mere fact that each assumes that Ockletree’s janitorial functions were purely secular in nature. Indeed, although it is not clear, FHS may have conceded as much. This distinction between religious and secular functions, however, raises the fundamental question of whether such an inquiry is permissible under the First Amendment.

Justice Wiggins concurring/dissenting opinion hints at the issue. In explaining why he believes the second question certified by the federal court should be rephrased, he states:

The original second certified question improperly focused on whether the employer discriminated on religious grounds, which requires courts to engage in excessive entanglement with religious doctrines and practices. Washington courts would be asked to determine what constitutes a particular religion’s purpose, practice, and activity and determine whether the reason for the discrimination is related. This is an intrusive inquiry into religious doctrine.

Instead, I believe the constitutionality of the exemption depends entirely on whether the employee’s job responsibilities relate to the organization’s religious practices. In other words, RCW 49.60.040(11) is constitutionally applied in cases in which the job description and responsibilities include duties that

49 2014 Wash. LEXIS 76, at *9, n.4.
50 See 2014 Wash. LEXIS 76, at *9, n.4 (“Whether the exemption of religious nonprofits from WLAD violates the federal equal protection clause is not a question of state law certified to this court.”).
55 700 F.3d 169 (5th Cir. 2012).
are religious or sectarian in nature. This test permits an objective examination of an employee’s job description and responsibilities in the organization.\footnote{2014 Wash. LEXIS 76, at *60-61.}

In \textit{NLRB v. Catholic Bishop of Chicago},\footnote{440 U.S. 490 (1979).} the National Labor Relations Board had certified a labor organization as the representative of a unit of lay faculty members in a high school operated by the Roman Catholic Church. The school refused to bargain with the labor organization, arguing, \textit{inter alia}, that the First Amendment precluded the Board’s assertion of jurisdiction. When the case reached the Supreme Court, the Court avoided the constitutional issue. Instead, it held that, because the assertion of jurisdiction would give rise to serious constitutional questions, it would not infer that Congress extended coverage to such religious organizations in the absence of a clearly expressed intent to do so — an expression of intent that the Court did not find.

In \textit{University of Great Falls},\footnote{331 N.L.R.B. 1663 (2000), enforcement denied, 278 F.3d 1335 (D.C. Cir. 2002).} the Board sought to enforce a bargaining order requiring a university owned and operated by the Catholic Church to bargain with a union representing its faculty. In issuing the bargaining order, the Board, seeking to avoid the implications of \textit{Catholic Bishop} by eliminating the religious considerations, had conducted a factual inquiry and concluded that “the propagation of a religious faith [was] not the primary purpose” of the University. The D.C. Circuit refused to enforce the order, stating:

In \textit{Catholic Bishop} the Court feared that NLRB jurisdiction over church-operated schools “will necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the schools’ religious mission.” As the Court stated, “it is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions.” The Court predicted that if the NLRA conferred jurisdiction, the Board could not “avoid entanglement with the religious mission of the school in the setting of mandatory collective bargaining.” Here the Board has engaged in the sort of intrusive inquiry that Catholic Bishop sought to avoid. As the Court feared, the Board has gone “beyond resolving factual issues” and engaged in inquiry into the “religious mission” of the University. Here the “very process of inquiry leading to findings and conclusions” by the Board, as well as the Board’s conclusions have implicated the First Amendment concerns at issue in Catholic Bishop. The NLRB’s “substantial religious character” test with its multifaceted analysis not only creates the same constitutional concerns that led to the Supreme Court’s decision in Catholic Bishop, it is so similar in principle to the approach rejected in Catholic Bishop that it is inevitable that we must reject this “new” approach.\footnote{Univ. of Great Falls v. N.L.R.B., 278 F.3d 1335, 1341 (D.C. Cir. 2002) (citations omitted; emphasis in original).}

On the surface, the determination of whether an employee is engaged in secular or religious functions may not appear to implicate the First Amendment issues that have troubled the Supreme Court and the lower federal courts — particularly where the claimant is employed in a position not unique to a religious organization — a security guard like Ockletree, or a messenger or gardener, for example. But what if the religious organization asserts that, as matter of its theological foundation, all employees of the organization serve its doctrinal mission simply by virtue of their employment. Will the courts have to inquire into the bona fides of such a contention and will they be permitted to do so?

This and other questions will continue to bubble to the service so long as government seeks to intrude on the operations of religious organizations in the context of political and legal umbrella that embodies free speech and religion rights.

\textit{Pete Lareau writes from his office in Paso Robles, California.}
SUPREME COURT REVIEW

Court Won’t Review Ninth Circuit’s Decision that Police Officer’s Reports of Wrongdoing by Fellow Officers Were Outside of His Employment Responsibilities


On a number of occasions, Angelo Dahlia, a detective in the Burbank Police Department ("BPD"), observed his fellow officers beating suspects during the course of interrogating them. He brought his observations to the attention of Lieutenant Jon Murphy, his superior officer, but was essentially told to "stop his sniveling." A month later, Dahlia and another detective again approached Murphy and told him that the beatings and madness "had to stop," but nothing was done and the abusive tactics continued.

When, a few months later, a BPD Internal Affairs investigation of the beatings was commenced, some of the officers who participated in the beatings threatened Dahlia, advising him to keep his mouth shut. In April of 2009, Lieutenant Omar Rodriguez, one of the officers who had participated in the beating and who had previously threatened Dahlia, called Dahlia into his office, closed the door and shut the blinds. He then pulled his gun from his holster, looked at Dahlia, placed the gun in his drawer and said, "Fuck with me and I will put a case on you, and put you in jail. I put all kinds of people in jail, especially anyone who fucks with me!"

Dahlia reported the incident to the Burbank Police Officers Association ("BPOA"). The following month, he reported the misconduct, threats, harassment and intimidation he had experienced at BPD to the Los Angeles Sheriff’s Department ("LASD"). Four days later, he was placed on administrative leave, and shortly thereafter, filed a complaint under 42 U.S.C. § 1983 asserting that the BPD, in violation of his First Amendment rights, had retaliated against him because of his reports about the unlawful activity of his fellow officers. The district court ruled that Dahlia could not establish, as a matter of law, that he spoke as a private citizen rather than as a public employee. It also concluded that being placed on administrative leave did not constitute an adverse employment action for purposes of First Amendment protection.


When the case reached the Ninth Circuit (sitting en banc), the court first considered whether, under the Supreme Court’s decision in Garcetti v. Ceballos, 547 U.S. 410 (2006), Dahlia had reported the unlawful activities in the course of his responsibilities as a police detective, thereby removing that speech from the protection of the First Amendment. Overruling its own decision in Huppert v. City of Pittsburg, 574 F. 3d 696 (9th Cir. 2009), the Ninth Circuit held that that the issue of whether speech is made within the scope of an employee’s official duties is a question of fact. In conducting that factual inquiry, the court noted three “guiding principles:” (1) whether or the employee reported within the chain of command; (2) whether the subject matter of the communication was a routine matter typically addressed by the employee or something raising broader, departmental concerns, such as corruption or abuse; and (3) whether the speech was made in direct contravention of a superior’s orders.

Applying these criteria, the court held that Dahlia’s reports to Lieutenant Murphy, his superior, were within the chain of command and, therefore, not protected. With respect to Dahlia’s meetings with Internal Affairs, the court held that Dahlia may have acted outside of the scope of his employment if he cooperated with the Internal Affairs unit and provided information. Because the allegations were unclear as to whether meeting and cooperating with the Internal Affairs is considered part of a BPD’s officer’s duties, the Ninth Circuit resolved the ambiguity in Dahlia’s favor and concluded that he had adequately alleged that these meetings are protected under the First Amendment. The court also determined that Dahlia’s report to the BPOA was protected and, finally, that his reports to the LASD were clearly outside the chain of command.

The Ninth Circuit also considered whether placement of an employee on administrative leave constitutes an adverse employment action for purposes of establishing a First Amendment retaliation claim. Looking at the losses Dahlia alleged he suffered as a result of the BPD’s decision to place him on administrative leave—forfeiture of his right to take the sergeant’s exam, loss of holiday and on-call pay, and divestiture of the opportunity to additional investigative experience—the Ninth Circuit agreed with Dahlia that the BPD’s decision to place him on administrative leave, and the associated consequences, appeared “reasonably likely to deter employees from engaging in protected activity[,]” and held that, under some circumstances, placement on administrative leave may constitute an adverse employment action.

Dahlia had also argued that Rodriguez’s threat to “put a case” on Dahlia and put him “in jail” were adverse

(Pub. 1239)
employment actions. The Ninth Circuit agreed, again relying upon the rationale that such threats, if true, were made for the specific purpose of chilling Dahlia’s speech. The fact that Dahlia apparently did not disclose any information to IA was highlighted by the court as evidence that the threats may have actually had a chilling effect at least for a period of time.

In late February, the Supreme Court denied Burbank’s petition for writ of certiorari.

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**Court to Weigh in on FLSA Compensability of Time Spent in Security Clearances**


In *Busk v. Integrity Staffing Solutions, Inc.*, 713 F.3d 525 (9th Cir. 2013), the Ninth Circuit reversed the decision of a federal district court and held that time spent in security screenings was not compensable under the FLSA. Instead, the appellate court concluded that such time is compensable because it was “necessary to [Respondents’] primary work as warehouse employees.” On October 3, 2013, the employer filed a petition for certiorari asserting that the court’s conclusion respecting the compensability of time spent in security clearances:

squarely conflicts with decisions from the Second and Eleventh Circuits holding that time spent in security screenings is not subject to the FLSA because it is not “integral and indispensable” to employees’ principal job activities.

In early March of this year, the Court granted the petition.

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**Finding of Individual Liability for FLSA Violations Will Not Be Reviewed**


John Catsimatidis is the chairman, president, and CEO of Gristede’s Foods, Inc. In 2004, a group of Gristede’s employees filed suit against the company and three individual defendants — Catsimatidis, Gristede’s District Manager James Monos, and Gristede’s Vice President Gallo Balseca — alleging, amongst other things, violations of the Fair Labor Standards Act (“FLSA”). After two-and-a-half years of litigation, the district court granted summary judgment for the employees on their FLSA claims and held that they were entitled to liquidated damages, the amount of which would be determined in future proceedings. The employees reserved the right to move separately for a determination that the individual defendants were individually liable as joint employers.

Following the summary judgment order, the parties reached a settlement agreement, which the district court approved. The corporate defendants later defaulted on their payment obligations under the agreement. Plaintiffs then moved for partial summary judgment on Catsimatidis’s personal liability as an employer.

The district court granted the motion, finding that Catsimatidis “hired managerial employees,” “signed all paychecks to the class members,” had the “power to close or sell Gristede’s stores,” and “routinely review[ed] financial reports, work[ed] at his office in Gristede’s corporate office and generally preside[d] over the day to day operations of the company.” According to the district court:

> [f]or the purposes of applying the total circumstances test, it does not matter that Mr. Catsimatidis has delegated powers to others; what is critical is that Mr. Catsimatidis has those powers to delegate.

The court concluded that “[t]here is no area of Gristede’s which is not subject to [Catsimatidis’s] control, whether [or not] he chooses to exercise it,” and that, therefore, Catsimatidis “had operational control and, as such, [] may be held to be an employer.”

On appeal, the Second Circuit affirmed (*Irizarry v. Catsimatidis*, 722 F.3d 99, 2013 U.S. App. LEXIS 13796 (2d Cir. N.Y., 2013)) and the Supreme Court has now denied Catsimatidis’s Petition for Writ of Certiorari. In upholding the district court’s conclusion the Second Circuit observed that the Supreme Court has recognized:

that broad coverage [under the FLSA] is essential to accomplish the [statute’s] goal of outlawing from interstate commerce goods produced under conditions that fall below minimum standards of decency[]

and that the Court:

has consistently construed the Act liberally to apply to the furthest reaches consistent with congressional direction.

Still, said the Second Circuit, the case before it presented an issue that has never been directly address by the Supreme Court:

whether an individual within a company that undisputedly employs a worker is personally liable for damages as that worker’s “employer.”
Although acknowledging that it was a “close case,” the court ultimately determined that Catsimatidis was personally liable for liquidated damages. It noted that there was “no question that Catsimatidis had functional control over the enterprise as a whole[,]” and he hired managerial employees and possessed “overall financial control of the company.” In imposing individual liability, the court stated that it was:

guided by the principles behind the liquidated damages provision of the FLSA in resolving the impact of the totality of the circumstances described herein. The Supreme Court has noted that “liquidated damages as authorized by the FLSA are not penalties but rather compensatory damages ‘for the retention of a workman’s pay which might result in damages too obscure and difficult of proof for estimate other than by liquidated damages.’”

In the paragraph summarizing the reasoning underlying its decision to impose liability on Catsimatidis, the court stated:

Although we must be mindful, when considering an individual defendant, to ascertain that the individual was engaged in the culpable company’s affairs to a degree that it is logical to find him liable to plaintiff employees, we conclude that this standard has been met here. Catsimatidis’s actions and responsibilities — particularly as demonstrated by his active exercise of overall control over the company, his ultimate responsibility for the plaintiffs’ wages, his supervision of managerial employees, and his actions in individual stores — demonstrate that he was an “employer” for purposes of the FLSA.

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FLSA Damage Award to Undocumented Workers Not Disturbed


In March of this year, the Supreme Court denied a petition for writ of certiorari reviewing an Eighth Circuit case (_Lucas v. Jerusalem Café, LLC_, 721 F.3d 927 (8th Cir. 2013)) affirming an award of damages under the Fair Labor Standards Act to a group of undocumented workers. A brief summary of the Eighth Circuit decision follows.

Between June 2007 and March 2010, six Guatemalan undocumented workers were employed by the Jerusalem Cafe in Kansas City, Missouri (“Cafe”). They all worked an average of 60 to 77 hours per week, without receiving overtime, and often for less than minimum wage. They were paid a fixed weekly rate, in cash, regardless of hours worked — coming to about $3.90 per hour.

In early 2010, relations between the owners of the Cafe and the undocumented workers soured. One worker called the police after the Cafe’s owner’s nephew allegedly struck him. The Cafe’s owner offered the worker $500 to drop the charges and return to work, out of fear that the police would discover the Cafe’s illegal employment of undocumented workers. The undocumented worker refused, and was terminated. When the remaining five undocumented workers refused to falsify employment applications indicating that they did not start working for the Cafe until March 2010, they were also terminated. The undocumented workers sued the Cafe, and its then-owner Farid Azzeh and manager Adel Alazzeh (collectively, “the Employers”), for willfully violating the FLSA.

A jury ruled in the employees’ favor, rejecting the Employers’ “fantastic story” that the undocumented workers were “volunteers” during the approximate three-year time period of their service at the Cafe. In accordance with the jury’s verdict, the district court awarded $141,864.04 in actual damages for unpaid FLSA wages, $141,864.04 in liquidated damages (based on the jury’s finding that the Employers willfully failed to pay FLSA wages) $150,627.00 in legal fees, and $6,561.63 in expenses.

The Employers moved for judgment as a matter of law or a new trial on the basis that Plaintiffs were prohibited by law from receiving wages because they were not “employees” under the FLSA, as they were undocumented workers, nor did they have standing to bring their suit. The district court rejected both arguments, and the Employers appealed, arguing that the verdict should have been set aside on the theory that “the FLSA does not apply to employers who illegally hire unauthorized aliens.”

The Eighth Circuit began its analysis by recognizing that the only other United States appellate court to directly address whether the FLSA applies to employers who illegally hire undocumented workers is the Eleventh Circuit in 1988, which answered the question affirmatively. _Patel v. Quality Inn South_, 846 F.2d 700 (11th Cir. 1988). Numerous district courts and the Department of Labor (DOL) have also all agreed that employers who unlawfully hire undocumented workers must still comply with federal employment laws.

The court then recognized that, “where, as here, the statute’s language is plain, ‘the sole function of the courts is to enforce it according to its terms[,]” and, in the opinion of the Eighth Circuit, the FLSA has “the broadest definition [of “employee”] that has ever been
included in any one act.” The court quoted Justice Oliver Wendell Holmes opinion in United States v. Sullivan, 274 U.S. 259, 263 (1927) for the proposition that there is no “reason why the fact that a business is unlawful should exempt it from paying the taxes that if lawful it would have to pay.” In Lucas, too, there was no “reason why the fact that” the Employers unlawfully hired the undocumented workers should have exempted them from paying the wages “that if lawful” they “would have to pay.” Thus, following the Eleventh Circuit, the Eighth Circuit held that undocumented workers may recover unpaid and underpaid wages under the FLSA.

The DOL filed an amicus brief in support of undocumented workers, explaining that applying the FLSA to undocumented workers:

is essential to achieving the purposes of the FLSA to protect workers from substandard working conditions, to reduce unfair competition for law-abiding employers, and to spread work and therefore reduce unemployment by requiring employers to pay overtime compensation.”

Given the DOL’s decades-long consistency of taking the position that the FLSA applies to undocumented workers, “and the Secretary’s ‘specialized experience and broader investigations and information’ in these matters,” the court found that the DOL’s position was entitled to deference to the extent there was any statutory ambiguity.

The court also confirmed that Congress’s purposes in enacting the FLSA and the Immigration Reform and Control Act (“IRCA”) “are in harmony,” as both seek to prevent employers from taking advantage of undocumented workers. Therefore, the court agreed with the DOL’s position, independent of any deference to the DOL’s expertise. As the court stated:

The IRCA unambiguously prohibits hiring unauthorized aliens, and the FLSA unambiguously requires that any unauthorized aliens — hired in violation of federal immigration law — be paid minimum and overtime wages. The IRCA and FLSA together promote dignified working conditions for those working in this country, regardless of immigration status, while firmly discouraging the employment of individuals who lack work authorization.”

The court also decided that exempting undocumented workers from the FLSA would frustrate the purposes of the IRCA, because the acceptance of jobs with substandard wages and working conditions by undocumented workers “can seriously depress wage scales and working conditions of citizens and legally admitted aliens.” In the court’s view, holding that employers who violate both the IRCA and the FLSA liable under both statutes “advances the purpose of federal immigration policy by ‘offset[ting] what is perhaps the most attractive feature of [unauthorized] workers — their willingness to work for less than the minimum wage.’” Thus:

prohibiting employers from hiring unauthorized aliens is in harmony with requiring employers—including those who break immigration laws by hiring unauthorized workers—to provide fair working conditions and wages.

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**RECENT DEVELOPMENTS**

**ADA**

**ADA Plaintiff Not Qualified**


Weldon Williams worked for Revco Discount Drug Centers, Inc. as a pharmacist. Because, due to a medical condition, he could not stand for extended periods of time, he requested the full-time assistance of a pharmacy intern or technician so that he could perform his job functions. Revco refused Williams’ request on the basis that it was not a reasonable one, and he subsequently was terminated.

Williams brought suit alleging, *inter alia*, that Revco had engaged in disability discrimination in violation of the Americans with Disabilities Act (“ADA”). The district court granted Revco’s motion for summary judgment, finding that Williams was not able to perform the essential functions of his job as a pharmacist and that the accommodation he requested was not reasonable.

Williams appealed the dismissal of his case to the Eleventh Circuit Court of Appeals, which affirmed. In doing so, the court noted that in his deposition testimony, Williams acknowledged that his position involved extended standing and frequent movement around the pharmacy. Although Williams asserted that he could perform his duties with the assistance of a full-time assistant, the court explained that the ADA did not require Revco to permanently provide Williams with full-time technical support. Such assistance, the court pointed out, would require the elimination of essential functions of the pharmacist job and the reassignment of those functions to other employees, which the ADA does not require.
Even though there was evidence that Revco had provided Williams with technical support in the past, the court of appeals said that this did not render Williams’ request for continued support from another Revco employee to be reasonable and required under the ADA.

Appeals Court Revives ADA Claim

In early 2008, Janice Johnson, who worked as a public health aide for the City of Chicago’s Department of Public Health, missed eleven days of work. During her absence, Johnson’s supervisors tried unsuccessfully to reach her. Because Johnson was absent without approval for five consecutive days, the City initiated discharge proceedings against her for violating its personnel rules. Before the proceedings were completed, Johnson returned to work and presented her supervisors with a medical form stating that she had been hospitalized at the Sickle Cell Clinic at the University of Illinois College of Medicine. Given this information, the City did not continue with its discharge proceedings.

Soon thereafter, Johnson provided the City with a “reasonable accommodation request form” accompanied by a medical questionnaire completed by her physician stating that Johnson needed to use a walker and would suffer from “gait instability” for six to nine months. A notation on the form also suggested that Johnson be limited to desk work until further notice. The City denied Johnson’s request for accommodation, explaining that one of the essential functions of her job was to perform five to seven home visits per day. Subsequently, Johnson was terminated.

Johnson sued the City for disability discrimination in violation of the Americans with Disabilities Act (“ADA”) and the Rehabilitation Act of 1973, asserting that she had been discriminated against due to her medical condition (sickle cell anemia) when the City denied her request for desk work as a reasonable accommodation and terminated her from its employ. The district court granted the City’s motion for summary judgment, determining that Johnson had failed to show she had a disability within the meaning of the ADA because the difficulties she experienced in walking were “merely temporary.” Johnson appealed the dismissal of her case to the Seventh Circuit Court of Appeals, which reversed and remanded for further proceedings.

The appeals court determined that Johnson had presented sufficient evidence from which a reasonable jury could conclude that she was disabled under the ADA. The court said that it had “little difficulty” finding that Johnson’s sickle cell anemia constituted a physical impairment, which required her to refrain from physical exertion and to be restricted to desk duty, and that she would have “gait instability” for six to nine months. Based upon this evidence, the Seventh Circuit concluded that a reasonable jury could find that Johnson was substantially limited in her major life activity of walking and, thus, that she had an ADA covered disability.

Court Nixes Reasonable Accommodation Claim

While Cynthia Horn worked as a janitor for Knight Facilities Management-GM, Inc., she developed a sensitivity to cleaning products and was diagnosed with pneumonitis and mild hypoxia. Knight Facilities attempted to accommodate Horn by limiting her chemical exposure. Nonetheless, Horn’s symptoms still persisted, and she had to seek medical treatment. Horn was released to work by her doctor with a restriction of “no exposure to chemical solutions.” Knight Facilities supplied Horn’s doctor with a job description detailing her job duties, which required using chemicals for cleaning. After reviewing the description, Horn’s doctor continued to recommend that Horn avoid cleaning solutions altogether.

Given the statements from Horn’s doctor, Knight Facilities determined there was no work available to satisfy her medical limitations. Although Horn asked to work using a respirator, Knight Facilities concluded that even if Horn used a respirator, this would not satisfy her doctor’s restriction because she still would be exposed to chemicals through the use of her hands. Additionally, allowing Horn to use a respirator would constitute an undue hardship because Knight Facilities would have to purchase respirators for all of the other janitors. The company discussed with Horn other positions that might be available to her, but ultimately concluded there were no open positions within her seniority level. Having determined that Horn could not perform her existing job within her restrictions and that no alternatives were available, Knight Facilities terminated her.

Subsequently, Horn sued the company, alleging that it discriminated against her in violation of the Americans with Disabilities Act (“ADA”) by failing to accommodate her medical condition. The district court dismissed Horn’s suit on summary judgment, concluding that she was not qualified to perform her job with or without a reasonable accommodation. Horn v. Knight Facilities Management, 2012 U.S. Dist. LEXIS 170807 (E.D. Mich. Dec. 3, 2012).

Horn appealed to the Sixth Circuit Court of Appeals, which affirmed. Even assuming that Horn was disabled within the meaning of the ADA, the court concluded that
neither of Horn’s proposed accommodations were objectively reasonable because they both failed to comply with her physician’s restriction of “no exposure to cleaning solutions.” The appeals court found that any alterations in Horn’s job duties still would have involved exposure to cleaning chemicals, and there was no evidence that working with a respirator would have complied with her doctor’s restrictions because Horn still would have had to use or touch chemical solutions. The court explained that Horn’s personal belief that she could handle cleaning solutions did not create any dispute of fact in light of her doctor’s restrictions. Finally, the court determined that Knight Facilities genuinely tried to determine what, if any, reasonable accommodations could be made. Although on appeal Horn suggested different ways that Knight Facilities could have participated in the interactive process, Horn’s suggestions did not show that Knight Facilities failed to engage in the process or otherwise violate the ADA.

**Employer Demonstrated Non-Discriminatory Basis for Termination**

_Wright v. Memphis Light, Gas and Water Division, 2014 U.S. App. LEXIS 4348 (6th Cir. Mar. 6, 2014)_

Willie Wright, who has spoken with a stutter his entire life, worked for the City of Memphis Light, Gas and Water Division (MLGW) as a water treatment operator. Wright sought a promotion as a Customer Service Tech III and was selected for the position’s training program. After completing the classroom training, Wright started a 90-day probationary period during which he had to pass certain qualification requirements in order to be certified in the position. Wright failed three separate attempts at certification with three different instructors and, therefore, did not get the job.

Wright filed suit against MLGW alleging that he had been denied the Tech III position because of his speech impediment in violation of the Americans with Disabilities Act (“ADA”). The district court granted summary judgment to MLGW, finding that MLGW had shown a legitimate, non-discriminatory reason for denying him the Tech III certification, i.e., his failure on three separate occasions with three separate instructors to pass the certification requirements. In this regard, the court noted that Wright’s specific errors and deficiencies were unrelated to any speech problems that he might have, including failures to perform correctly gas-related tests and repairs. Thus, the court concluded that the evidence showed that MLGW made a reasonably informed and considered decision not to promote Wright to a Tech III position and that Wright had failed to show that the reasons proffered by his employer were simply a pretext for unlawful discrimination.

• Additionally, the Sixth Circuit found that even if Wright could present a _prima facie_ case of discrimination, MLGW had demonstrated a legitimate non-discriminatory reason for denying him the Tech III certification, i.e., his failure on three separate occasions with three separate instructors to pass the certification requirements. In this regard, the court noted that Wright’s specific errors and deficiencies were unrelated to any speech problems that he might have, including failures to perform correctly gas-related tests and repairs. Thus, the court concluded that the evidence showed that MLGW made a reasonably informed and considered decision not to promote Wright to a Tech III position and that Wright had failed to show that the reasons proffered by his employer were simply a pretext for unlawful discrimination.

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**Constitutional Law**

Extent of Public Employee’s Complaints against Supervisors Dooms His First Amendment Unlawful Discharge Claim


Thomas Kimmett was hired by Executive Deputy Attorney General Louis Rovelli — the Director of the Civil Law Division of the Office of the Attorney General (“OAG”) for the Commonwealth of Pennsylvania — as a Senior Deputy Attorney General to manage the Administrative Collections Unit (“ACU”) of the Financial Enforcement Section (“FES”) of OAG’s Civil Law Division. Rovelli reported to William Ryan, the First Deputy Attorney General, who, in turn, reported to Attorney General Tom Corbett.

The FES, which collects debts owed to various Commonwealth entities, is comprised of the Law unit and the
Administrative Collections unit ("ACU"). The Law unit handles bankruptcy cases and certain collection matters. The ACU collects debts owed to state entities, including the Department of Revenue ("DOR").

After he was hired, Kimmett reported alleged evidence of mismanagement, improprieties, and malfeasance in both the FES and the DOR to numerous individuals within OAG, including his immediate supervisors and others up the chain of command. When Stephen Brandwene retired as FES Chief, Michael Roman was hired to replace him.

In June 2008, unhappy with Kimmett’s performance, Roman and Rovelli removed him from a large software project that he had spearheaded and voiced their concerns about Kimmett to Ryan. As result, the three of them decided to transfer Kimmett to the Law unit.

In August 2008, however, Kimmett filed a federal complaint, asserting that Corbett, Nutt (Corbett’s Chief of Staff), Ryan, Rovelli, Brandwene, and Roman and certain high-level employees at the DOR failed to promote him in retaliation for his complaints of wrongdoing in the collection process and that they failed to investigate this “illegal misconduct” for “purely political purposes.” Kimmett also alleged that DOR employees “participated in the unlawful actions of the other defendants, including Corbett, in unlawfully covering up the illegal activities” and engaged in the “conspiratorial destruction of [Kimmett’s] promotional opportunities.”

Rovelli, believing the lawsuit damaged Kimmett’s working relationships with his supervisors and the DOR, and that his allegations of criminal behavior by Corbett and DOR employees precluded Kimmett from litigating in the name of the Attorney General or on behalf of the DOR, abandoned the plan to transition Kimmett to the Law unit.

In November 2008, Kimmett received his second annual performance evaluation, which criticized numerous aspects of his work and included a remedial plan that required Kimmett to work closely with Roman. In response to the evaluation, Kimmett stated that: (1) he believed that “the entire evaluation [was] inappropriate because it is part of an orchestrated and deliberate effort” by OAG staff to “discredit” him since his lawsuit; (2) he found it “surreal” that individuals he sued were the same individuals reviewing him; (3) Roman “was placed in [the position of Chief of the FES] to stifle and curtail any further investigations … and to fabricate and trump up charges against [him];” and (4) while he welcomed an inquiry into certain aspects of his work, such an examination could not “be performed by Roman or anyone in the Civil Law Division in a fair and unbiased way and not become a backdoor attempt to fabricate charges against [him].”

Rovelli, viewing Kimmett’s response as “unmeasured and intemperate” and as showing an unwillingness to accept supervision and to cooperate with the remedial plan, recommended that Corbett terminate Kimmett. After a meeting with Rovelli, Ryan, and Nutt, Corbett approved Rovelli’s recommendation and terminated Kimmett.

Kimmett then amended his federal court complaint to assert, among other things, that the defendants had retaliated against him in violation of the First Amendment by failing to promote him and by terminating his employment. The district court granted defendants’ motion for summary judgment, holding that, while portions of Kimmett’s speech were made as a citizen and addressed matters of public concern, defendants were entitled to summary judgment because the OAG’s interest in workplace harmony outweighed Kimmett’s and the public’s interest in Kimmett’s speech. On appeal, the Third Circuit affirmed.

The appellate court agreed that at least Kimmett’s action in filing his federal complaint against the defendants was protected activity under the First Amendment and that it related to a matter of public concern. Therefore, under the tests set forth in Pickering v. Board of Education, 391 U.S. 563 (1968) — (1) whether the employee’s speech was made as a citizen; (2) whether the speech related to a matter of public concern; and (3) whether the public employer had adequate justification for treating the employee differently from any other member of the general public — the Third Circuit had to address the third of these tests. And, as Pickering directs, that determination required the court to:

balance … the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

As stated by the Third Circuit, it was required to determine whether:

Kimmett’s “interest in the speech outweighs any potential disruption of the work environment and decreased efficiency in the office.”

Recognizing that whistle-blowing is certain to cause disruption in the relationship between the whistle-blower and those accused, the court found that “the mere existence of a workplace disruption” is not “sufficient to overcome the employee’s [First Amendment] interest.” “Instead, a public employer must tolerate a workplace disruption so long as it is ‘directly proportional to the importance of the disputed speech to the public.’” In the case before it, however, the court concluded that “the extent of the disruption caused by Kimmett’s allegations in his lawsuit tilts the Pickering balance in favor of Defendants.” In doing so, the court relied, to a great
extent, on Kimmett’s description of the impact of his allegations on the working relationship. Thus:

Kimmett himself stated that even being reviewed by his supervisors was “inappropriate because it [was] part of an orchestrated and deliberate effort” by OAG staff to “discredit” him since his lawsuit. In addition, even though he was required to work with Roman on compromises pursuant to his remedial plan, he claimed that, in light of the lawsuit, a review of the compromise process could not “be performed by Roman or anyone in the Civil Law Division in a fair and unbiased way and not become a backdoor attempt to fabricate charges against [him].” Hence, according to Kimmett, because of his lawsuit, it was “inappropriate” for his supervisors to review his work and he could not complete one of his assigned tasks in the remedial plan. For this reason, and as the District Court found, Kimmett’s own statements demonstrate that his lawsuit “impair[ed] discipline by superiors,” had “a detrimental impact on close working relationships for which personal loyalty and confidence are necessary,” and “impede[d] the performance of the speaker’s duties or interfere[d] with the regular operation of the enterprise.”

Individual Misled into Exchanging Sexual Favors for Non-Existent Public Job Has No Claim


Felice Vanaria began working with Cook County, Illinois’ Oak Forest Hospital in a position that involved coordinating continuing education programs for physicians and staff. He acquired the job solely through political connections; Oak Forest Hospital was a Cook County facility and Vanaria was recommended for the position by a Cook County Commissioner for whom Vanaria was working as a political operative and fund raier. The Hospital was not involved in the process of hiring Vanaria other than to put him on the payroll. It was simply told that Vanaria would be employed. What background checking occurred was minimal and did not disclose that Vanaria had previously been terminated by the Cook County Adult Probation Department because of his involvement in several incidents in which female probationers alleged he had sought sexual favors in exchange for looser conditions of probation.

Shortly after he was employed by the Hospital, a representative for the Eli Lilly & Co. pharmaceutical company alleged that he had attempted to condition her participation in one of the programs he administered on her giving him a massage. An investigation resulted in oral counseling for Vanaria and an order to stay away from the representative, but no discipline.

In January 2007, Vanaria persuaded Krystal Almaguer, a then unemployed masseuse, that he could use his political influence to obtain for her a high-paid physical therapist position at the Hospital in return for erotic masseuse services. Almaguer believed him and, on more than one occasion, removed her clothes and manually stimulated him. Almaguer became suspicious of Vanaria’s bonafides when she had not been employed and Vanaria offered to get her an even higher paying position in return for additional sexual contact. At that point, she called the Hospital’s HR department, which informed her that the positions she had been offered never existed. After Almaguer enlisted the help of the local police department, Vanaria pled guilty to charges of official misconduct and bribery and Almaguer filed suit against Cook County in the United States District Court for the Northern District of Illinois.

Almaguer’s complaint alleged a violation of Title VII, as well as due process and equal protection claims. Eventually the district court granted summary judgment in favor of Cook County on all the claims. On appeal, the Seventh Circuit affirmed.

The appellate court first addressed Amaguer’s equal protection claim that that Cook County’s policy of not responding to sexual harassment complaints was the cause of her injury. She relied on Bohen v. City of East Chicago, Indiana, 799 F.2d 1180, 1185 (7th Cir. 1986) in which the court recognized that sexual harassment “constitutes sex discrimination in violation of the equal protection clause and is actionable under § 1983.” As had the district court, the Seventh Circuit rejected the claim because Almaguer could not establish that the County had a custom or policy of inadequately investigating claims of sexual harassment. Because Vanaria was a state employee while employed by the Adult Probation Department, the only evidence produced by Almaguer of sexual harassment by Vanaria as a County employee was the incident involving the representative of Eli Lilly & Co. This, said the court, even when coupled with the County’s failure to immediately terminate Vanaria after her allegations became known, did “not come close to establishing the kind of pervasive custom that would give rise to liability under Bohen[.]”

Summarizing, the court declared:

Municipalities may be found directly liable only when their own policy or custom is the “moving force” behind the deprivation. Here, it is clear that
the moving force behind the harassment was Vanaria, not Cook County.

(Citation omitted).

Almaguer next argued that Cook County’s practice of failing to screen political employees caused her to suffer a violation of her due process right to bodily integrity. The court commenced its analysis of this issue by quoting Supreme Court precedent:

We begin by noting the Supreme Court’s counsel that “[w]here a plaintiff claims that the municipality has not directly inflicted an injury, but nonetheless has caused an employee to do so, rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employee.” [Okl. v. Brown, 520 U.S. 397, 405 (1997)]. In Canton v. Harris, the Supreme Court held that to establish municipal liability on the theory that a facially lawful municipal action has led an employee to violate a plaintiff’s rights, a plaintiff must demonstrate that the municipal action was taken with “deliberate indifference” to its known or obvious consequences. 489 U.S. 378, 388, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989). Deliberate indifference means that the municipality knows or should know that consequences will ensue because those consequences were an obvious result of its conduct. “A showing of simple or even heightened negligence will not suffice.” Brown, 520 U.S. at 407.

Applying these principles the Seventh Circuit concluded that the County was not culpable.

In our view, imposing liability on Cook County under these facts would substitute conjecture and principles of mere negligence for the “rigorous standards of culpability and causation” the Supreme Court has imposed. Simply put, it is too much of a stretch to say that the county not only should have known Vanaria would commit various sexual misdeeds, but that he would also invent a phony position of power that would allow him to violate the bodily integrity of someone he had no business reason to come in contact with.

Our conclusion means two things. First, it means that the decision to hire Vanaria was not the cause of Almaguer’s injury in anything but the “but for” sense. It was not, in other words, the “moving force” behind the injury. Second, and relatedly, it means that the county lacked the requisite mental state of deliberate indifference.

(Citations omitted).

Lastly, the court turned to Almaguer’s claim that the County violated Title VII when it allowed Vanaria to condition employment at the Hospital on acquiescence to his sexual requests. It concluded that, even if it could be established that the County was responsible for Vanaria’s actions, Almaguer could not prevail on this claim because she could not establish an adverse employment action.

To proceed on a refusal-to-hire claim, a plaintiff must at a minimum establish that she suffered some adverse employment action, namely, that she was passed over for a job. When no job exists, the plaintiff cannot be said to have suffered any adverse employment action. In short, the county did not refuse to hire Almaguer because of her sex; it refused to hire her because there was no position for a massage therapist at the hospital. It was not hiring anyone.

(Citations omitted).

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**FMLA**

**Non-FMLA Protected Vacation to Care for Father Supports Firing**


The Ninth Circuit has affirmed a jury verdict in favor of an employer that fired an employee who took vacation time to care for her ailing father in Guatemala. The employee had specifically declined to use leave available to her under the Family and Medical Leave Act (FMLA), which might have protected her absence from work. This decision reinforces the need for both employers and employees to clearly articulate whether leave taken is FMLA qualifying and protected.

Maria Escriba worked for Foster Poultry for 18 years when she was fired for violating the company’s “three day no-show, no-call rule,” after the end of a two week vacation that Escriba took to care for her ill father. When she requested the time off, Escriba made clear that she did not want to take the leave as “family leave” but as vacation time.

It is possible that there may have been something lost in translation: Escriba spoke little English, and her supervisor no Spanish. But even with another supervisor interpreting for them, Escriba was clear that she did not want the time
to be FMLA protected leave. Perhaps she was trying to “bank” it and use FMLA leave later if necessary since, like most companies, Foster Poultry runs paid time off and FMLA leave concurrently. Foster Poultry does not treat leave as FMLA leave when an employee expressly states that the time off should not be counted as FMLA leave, and has other paid leave available. It does this to avoid an allegation that the company is forcing an employee to take FMLA leave, thereby interfering with the employee’s FMLA rights.

So, Escriba went on her two week vacation to Guatemala. But then Escriba did not return to work as planned, and she did not call in for 16 days after she should have returned. Escriba was fired for job abandonment. She sued, alleging an interference claim under the FMLA and the California’s equivalent statute. The matter went to trial, with the jury finding in the company’s favor. Escriba appealed.

Affirming the judgment, the Ninth Circuit first noted that the FMLA does not expressly state whether an employee may defer FMLA rights. But then, looking to the DOL’s FMLA regulation 825.302(c) on employee notice requirements, the court observed the regulation provides that “[i]n all cases, the employer should inquire further of the employee if it is necessary to have more information about whether FMLA leave is being sought by the employee, and obtain the necessary details of the leave to be taken.” (Emphasis added).

This language, said the court, “strongly suggests that there are circumstances in which an employee might seek time off but intend not to exercise his or her rights under the FMLA. The court continued:

[h]olding that simply referencing an FMLA-qualifying reason triggers FMLA protections would place employers like Foster Farms in an untenable situation if the employee’s stated desire is not to take FMLA leave. The employer could find itself open to liability for forcing FMLA leave on the unwilling employee. See, e.g., Wysong v. Dow Chem. Co., 503 F.3d 441, 449 (6th Cir. 2007) (noting that “[a]n involuntary-leave claim,” alleging that an “employer forces an employee to take FMLA leave,” is “really a type of interference claim”). We thus conclude that an employee can affirmatively decline to use FMLA leave, even if the underlying reason for seeking the leave would have invoked FMLA protection. See, e.g., Ridings v. Riverside Med. Ctr., 537 F.3d 755, 769 n.3 (7th Cir. 2008) (“If an employee does not wish to take FMLA leave but continues to be absent from work, then the employee must have a reason for the absence that is acceptable under the employer’s policies, otherwise termination is justified.”) (Emphasis added)).

The court also noted that Escriba was familiar with her FMLA rights, having successfully taken FMLA leave as a Foster Poultry employee on fifteen prior occasions (out of 18 years working at the company). So, it appeared, Escriba knew exactly what she was doing by using paid leave and preserving her FMLA eligibility for another time. As such, said the court, a jury could reasonably conclude that there was no FMLA interference by the company.

The Escriba case reinforces a couple of points. First, while an employer gets to make the decision as to whether an absence is FMLA qualifying, the employer should not mandate that leave is FMLA leave when an employee specifically rejects the use of FMLA. The employer may want to remind the employee that, in such a case, the absence is not protected, but should not force the employee to use FMLA leave. Second, an employee should avoid trying to be too cute in using paid leave for FMLA qualifying reasons but declining to invoke the FMLA. The FMLA was designed to balance the needs of workplace and family, and an employee who looks like he or she is trying to wring out as much leave as possible from an employer will not be a sympathetic plaintiff.

### FLSA

**Narrowing of Exempt Employee Exemption in Offing**

On March 13, President Obama signed a memorandum that begins the process of updating the Fair Labor Standards Act’s overtime rules. The memorandum directs the Secretary of Labor to update the FLSA’s overtime rules and to consult with businesses and workers during the process. The call for change apparently is aimed primarily at revising the standard for determining whether an employee is exempt from the law’s overtime pay requirements on account of status as an executive, administrative or outside sales employee. The President noted that, in some cases, the federal overtime exemption, originally aimed at highly paid employees, now exempts employees making as little as $23,000 a year. “It doesn’t make sense that in some cases this rule actually makes it possible for salaried workers to be paid less than the minimum wage,” the president said. “It’s not right when business owners who treat their employees fairly can be undercut
by competitors who aren’t treating their employees right. If you’re working hard, you’re barely making ends meet, you should be paid overtime. Period.”

The fact sheet accompanying a DOL announcement of the initiative appears below.

The White House
Office of the Press Secretary
For Immediate Release
March 13, 2014

FACT SHEET: Opportunity for All: Rewarding Hard Work by Strengthening Overtime Protections

After weathering the Great Recession and through five years of hard work and determination, America is creating jobs and rebuilding our economy. But as a result of shifts that have taken hold over more than three decades, too many Americans are working harder than ever just to get by, let alone to get ahead.

President Obama believes that, in America, if you work hard and take responsibility, you should have the opportunity to succeed. That’s why he has pledged to make 2014 a year of action, working with Congress where they’re willing, but using his phone and his pen wherever he can to build real, lasting economic security for the middle class and those working hard to become a part of the middle class.

As part of that effort, today, President Obama is directing the Secretary of Labor to begin the process of addressing overtime pay protections to help make sure millions of workers are paid a fair wage for a hard day’s work and rules are simplified for employers and workers alike.

Basic Overtime Protections Have Eroded

The overtime rules that establish the 40-hour workweek, a linchpin of the middle class, have eroded over the years. As a result, millions of salaried workers have been left without the protections of overtime or sometimes even the minimum wage. For example, a convenience store manager or a fast food shift supervisor or an office worker may be expected to work 50 or 60 hours a week or more, making barely enough to keep a family out of poverty, and not receive a dime of overtime pay. It’s even possible for employers to pay workers less than the minimum wage per hour.

The overtime and minimum wage rules are set in the Fair Labor Standards Act, originally passed by Congress in 1938, and apply broadly to private-sector workers. However, there are some exceptions to these rules, which the Department of Labor has the authority to define through regulation. One of the most commonly used exemptions is for “executive, administrative and professional” employees, the so-called “white collar” exemption.

Workers who are paid hourly wages or who earn below a certain salary are generally protected by overtime regulations, while those above the threshold who perform executive, professional or administrative duties are not. That threshold has failed to keep up with inflation, only being updated twice in the last 40 years and leaving millions of low-paid, salaried workers without these basic protections. Specifically:

- In 1975 the Department of Labor set the threshold below which white collar workers were entitled to overtime pay at $250 per week.
- In 2004 that threshold was set at $455 per week (the equivalent of $561 in today’s dollars). This is below today’s poverty line for a worker supporting a family of four, and well below 1975 levels in inflation adjusted terms.

Today, only 12 percent of salaried workers fall below the threshold that would guarantee them overtime and minimum wage protections (compared with 18 percent in 2004 and 65 percent in 1975). Many of the remaining 88 percent of salaried workers are ineligible for these protections because they fall within the white collar exemptions. Many recognize that these regulations are outdated, which is why states like New York and California have set higher salary thresholds.

At the same time, employers and workers alike have difficulty navigating the existing regulations, and many recognize that the rules should be modernized to better fit today’s economy.

Details of the Presidential Memorandum

Improving the overtime regulations consistent with the Memorandum the President will sign today could benefit millions of people who are working harder but falling further behind. The Fair Labor Standards Act protects over 135 million workers in more than 7.3 million workplaces nationwide.

The Presidential Memorandum instructs the Secretary of Labor to update regulations regarding who qualifies for overtime protection. In so doing, the Secretary shall consider how the regulations could be revised to:

- Update existing protections in keeping with the intention of the Fair Labor Standards Act.
- Address the changing nature of the American workplace.
- Simplify the overtime rules to make them easier for both workers and businesses to understand and apply.
USERRA

Court Reverses Grant of Summary Judgment in USERRA Case

_Dorris v. TXD Services_, 2014 U.S. App. LEXIS 3716 (8th Cir. February 27, 2014)

Jonathan Dorris began working for TXD Services in early 2007. In April of that year, Dorris notified his direct supervisors and TXD’s human resources department that he had received Warning Orders that he would be mobilized within six months in connection with Operation Iraqi Freedom. After receiving definite orders in early September, Dorris spoke with TXD managing partner Joe Poe, inquiring whether TXD would make up the difference in his salary. Poe declined to do so and Dorris continued to work for TXD until September 11, 2007. He reported for training at Fort Chaffee on October 1 and served on active duty in Iraq for approximately 12 months beginning in January 2008.

In February 2008, while Dorris was on active duty in Iraq, TXD sold substantially all its assets to Foxxe Energy Holdings, LLC (“Foxxe”), which took over TXD’s operations without interruption. The sale contract included as an exhibit a listing of all personnel currently employed by TXD, which did not include Dorris’s name. Following the asset sale to Foxxe, TXD ceased to operate as a going concern.

Dorris returned to the United States on temporary leave in August 2008 and learned that good friends at TXD were hired by Foxxe, that Foxxe hired “all” of TXD’s employees, and that no unemployment claims were asserted against TXD following the sale. The Army then wrote Foxxe a letter to make it aware of Dorris’s “unsettling situation,” stating that, “[h]ad there been no change of hands between organizations, SGT Dorris would have been entitled to reemployment due to wrongful termination.” Dorris returned to the United States and was ready to resume work on December 15, 2008. In April 2009, Dorris was hired by Foxxe to the same position he had held at TXD.

In November 2010, Dorris filed suit against TXD alleging that it had violated the Uniformed Services Employment and Reemployment Rights Act (“USERRA”) by firing him while he was deployed on active duty. Prior to the close of discovery, TXD moved for summary judgment, arguing that Dorris has no claim that TXD violated USERRA when he was denied reemployment in December 2008, because it is undisputed that TXD had been out of business for ten months and therefore “the employer’s circumstances have so changed as to make such reemployment impossible or unreasonable.” The district court agreed that the sale of TXD to Foxxe precluded Dorris from recovering on his failure to reemploy claim. It also held that Dorris could not recover on the theory that TXD had unlawfully fired him by not including his name on the current employee list provided to Foxxe. According to the district court:

> [W]hile Mr. Dorris was on active long-term military duty, TXD would not have considered him an active or current employee. He would not have made the list provided by TXD to Foxxe. That does not violate USERRA.

In response to the evidence presented by TXD on this point, Mr. Dorris has not offered any evidence to show that TXD treated any similarly situated uniformed service members differently than he was treated. . . . Mr. Dorris also has not offered any evidence that TXD allowed employees on leave of absence or furlough to remain on any list of TXD’s active or current employees.

On appeal, the Eighth Circuit reversed. It viewed the pertinent issue as:

> whether TXD violated its USERRA obligations to Dorris while he was on leave by not including him on the list of TXD employees provided to prospective employer Foxxe.

In concluding that Dorris had presented sufficient evidence to withstand a motion for summary judgment on this issue the court noted that § 4316 of the statute provides that a person on leave covered by the statute is entitled to such “right and benefits” not determined by seniority as are provided to other employees on other types of leave. This, said the court:

> requir[es] employers, with respect to rights and benefits not determined by seniority, to treat employees taking military leave, equally, but not preferentially, in relation to peer employees taking comparable non-military leaves . . . .

Although not determining the issue affirmatively, the court held that a reasonable jury could find that the opportunity for seamless transfer of employment to a successor employer was an “advantage” or “benefit” of TXD employment. The court next considered whether employees of similar seniority on leave “for reasons other than military service” would have been included on the list of current employees provided to Foxxe. In resolving this issue in favor of TXD, the district court held that Dorris had the burden of producing evidence relevant to whether TXD treated him the same as all employees on comparable non-military leaves. That conclusion, the appellate court found, was erroneous:

> [T]his determination reverses the statutory allocation of these burdens . . . . [I]f being on the list was
a benefit of employment and Dorris’s military service was “a motivating factor” in his not being on the list, the burden shifts to TXD to show that the same action would have been taken in the absence of military service, i.e., that anyone similarly on furlough or leave of absence would have been left off the list.

Accordingly, the Eighth Circuit reversed the grant of summary judgment and remanded for further proceedings consistent with its opinion.

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**Wage and Hour**

**New H-2B Wage Regulation Upheld**


On January 19, 2011, the Department of Labor (the “DOL”) issued a new regulation governing the calculation of the minimum wage a U.S. employer must offer in order to recruit foreign workers as part of the H-2B visa program. The program permits U.S. employers to recruit foreign workers to fill unskilled, non-agricultural positions that no qualified U.S. worker will accept. In September 2011, a group of associations representing employers in non-agricultural industries that recruit H-2B workers and stand to face higher labor costs as a result of the 2011 Wage Rule challenged the validity of the Rule by initiating an action in the United States District Court for the Western District of Louisiana against the Department of Labor, the Department of Homeland Security, and the Secretaries of the respective agencies. The complaint alleged that the promulgation of the Rule violated both the Administrative Procedure Act (“APA”) and the Regulatory Flexibility Act (“RFA”).

The case was transferred to the United States District Court for the Eastern District of Pennsylvania where the plaintiffs posited two primary arguments in support of their motion for summary judgment: (1) the DOL lacks authority to promulgate legislative rules concerning the H-2B program; and (2) even if the DOL has such rulemaking authority, the DOL’s violation of certain procedural requirements of the APA and RFA invalidates the Rule entirely. The lower court rejected both arguments and granted the defendants’ motion for summary judgment.

On appeal, the Third Circuit affirmed. In a lengthy and exhaustive opinion that traces the history of the rule making and the litigation leading to its decision, the court concludes that:

1. the DOL has the authority to engage in rulemaking concerning the H-2B program;
2. the DOL gave sufficient notice to apprise interested parties of the substance of the Rule, including the legal basis for, and purpose of, the Rule;
3. the DOL adequately considered employer interests in promulgating the Rule and did not establish the wage rate at a level intended to attract U.S. workers, but, instead, balanced the interests of assuring an adequate labor force while protecting the wage rates of similarly employed U.S. workers; and
4. the DOL did not err in eliminating the four-tier wage methodology from the H-1B program as the prevailing wage calculation mechanism in the H-2B program.

_Editor’s note_: As recognized by the Third Circuit, its decision has the potential for creating a circuit split. In *Bayou Lawn & Landscape Services v. Secretary of Labor*, 713 F.3d 1080 (11th Cir. 2013), the Eleventh Circuit rejected the DOL’s argument that it has rulemaking authority in the context of the H-2B program pursuant to a lawful conditioning by DHS of its authority to grant or deny H-2B visa petitions. The Eleventh Circuit holding issued in a case in which that court was reviewing a district court’s grant of a preliminary injunction against enforcement of the Rule. The Third Circuit, therefore, observed:

that the procedural posture of Bayou — an appeal from the grant of a preliminary injunction, rather than from a final judgment — means that the Bayou Court’s decision is not the final word from the Eleventh Circuit on the question of the DOL’s general rulemaking authority. The three-member panel in Bayou opined only on whether the District Court abused its discretion in finding that the employer-plaintiffs were likely to succeed on the merits of their challenge to the DOL’s rulemaking authority, not on whether the DOL actually has that authority or not. A circuit split is thus not yet a foregone conclusion.

(Citation omitted).
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